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HAYES & JARMAN'S

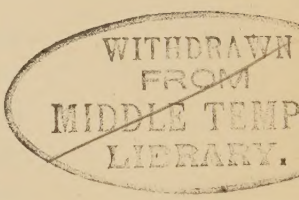
CONCISE

FORMS OF WILLS

WITH

PRACTICAL NOTES

FIFTEENTH EDITION.



BY

CLAUDE EUSTACE SHEBBEARE

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

"Ah wo worthe the whyle that folke thynke not of this in time."

A dyalogue of coumfort agaynst tribulacion
by Sir Thomas More, Knight, sometime
Lord Chancellor of England.

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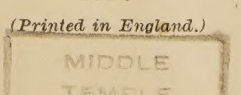

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INTRODUCTION

TO THE FIFTEENTH EDITION.

THAT this work should be described as the Fifteenth Edition of *Hayes and Jarman's Forms of Wills* can but seem odd, when we reflect that it may be said of those eminent conveyancers that they had already begun to "flourish" before the accession of Her late Majesty Queen Victoria. Almost as reasonably might we style an A B C or a Bradshaw a new edition of Paterson's Roads. For the legislation of 1925 would so much have astonished Mr. Hayes and Mr. Jarman that an Editor of the book to-day might well consider it a presumption to hide his own responsibility behind the glory of their names. Never could they have dreamt—even during those long vacations of theirs which began early in June and lasted until the 2nd November—that there would come a day when copyholds would be no more; when an entail could be barred by Will; when, notwithstanding all "rules of law and equity," chattels could be entailed; when a man's subsequent marriage would not revoke a Will made by him in favour of his intended wife; when the realty of an intestate would devolve on death in the same way as personalty; when the Statute of Uses would be repealed, and the rule in *Shelley's Case* abolished; and that—despite all the recent changes in

the law of land tenure—Wills could be drawn in Forms still called their own.

And yet, notwithstanding the fact that a small part of the present book can be traced to the Authors, it is nevertheless true that in the Forms and in the Notes much of their own language has for ninety years survived. The eloquent dissertation now entitled A Practical View of the Wills Act—but by them A Practical View of the New Statute of Wills—was penned by the Authors at a time when that measure was yet regarded as a novelty, and, with its opening sentence of almost eighteenth-century flavour, has lived through the prunings and the graftings of all subsequent editions to decorate the pages of the book to-day.

But the character of the work has changed, for it is now quite as much a book of case law as a book of Precedents, and what was once a little book of Forms with Notes has tended to become a large book of Notes with Forms. Few indeed of the phrases occurring in the Forms call for quite such a mass of learning as a Note will often be found to supply, and already in the time of Sir George Jessel and Vice-Chancellor Hall the book had come to be regarded as a book of law.

In the Fourteenth Edition reference was made to more than 3,000 cases, and although in this Edition 72 of them have on account of the new legislation been omitted, it has been found necessary to add 140. The collection of cases cited in the book is now the more valuable, as fifteen years have elapsed since *Jarman on Wills* was last issued.

In the Forms and in the Notes which now appear, the Editor has dealt with the alterations necessitated by the Settled Land Act, 1925, the Trustee Act, 1925, the Law of Property Act, 1925, the Land Registration Act, 1925, the Administration of Estates Act, 1925, and the Supreme Court of Judicature (Consolidation) Act, 1925, and he must hope that this Edition is such as might have been placed before the profession by the learned Authors themselves, had they lived to appreciate the provisions of those Acts.

C. E. S.

5 New Square,
Lincoln's Inn.
September, 1925.

PREFATORY REMARKS

TO THE FIRST EDITION—1835.

THOUGH many works on Wills, with the accompaniment of Precedents, are already in the hands of the practitioner, yet a portable volume of short forms, not copied from draughts, but originated with a view to general applicability, and illustrated by succinct statements of the law upon points of frequent occurrence, seemed to be still wanting. This desideratum the authors have endeavoured to supply—with what success the Profession must judge.

A notion has unfortunately obtained, that, while to the preparation of a deed learning and experience are essential, the disposition of a man's property by will may be safely confided to the minimum of legal knowledge. Hence, the conveyancer is rarely consulted, the solicitor is often dispensed with, and the schoolmaster too frequently called in; or, if the schoolmaster be not at hand, there is commonly to be found in every village a will-maker of equal courage and ignorance, the collector or inheritor of exploded forms and phrases. This notion proceeds upon the two-fold error, that wills are expounded not according to the rules of law, but according to the dictates of common sense—and that common sense is the same in all men. The rules of law, when applied (as applied they must be) to wills thus unadvisedly prepared, often defeat the intention, that is, the *probable* intention; but if those rules were discarded for a season, common sense, outraged by the conflict of opinion, making one poor word, perhaps, the sport of many contrarient decisions, would soon demand their restoration. The general impression, however, that wills are not amenable to the strict rules of legal construction extended its influence to the judicature, and induced a certain laxity of interpretation which confirmed and encouraged the original error. Thus confident ignorance on the one hand, and judicial indulgence on the other, produced and reproduced blunders and obscurities of every shape and shade, which have swelled the mass of adjudication, without advancing the law as a science. But we may observe in some of the later judgments a tendency to establish a whole-

some strictness of construction, to discountenance arguments drawn from vague and speculative views of the intention, and to recur to Lord Coke's "good rule, always to judge in such cases (*i.e.* cases of informal wills) as near as may be, and according to the rules of law."* By steadily acting upon this sage advice, by showing that the principles of interpretation applicable to deeds and wills, which (with two or three well-established exceptions) are the same in their institution, are likewise the same in their application, the Profession and the Public would soon be taught that the last important office of providing for the disposal of men's possessions, when death has precluded the possibility of explanation or correction, requires at least the same degree of information and intelligence which is confessedly necessary to the conveyance of a rood of land from a seller to a purchaser. Such an inflexible course of decision would tend to abate, even in professional men, somewhat of that confidence which now prompts them to draw wills without any previous study, relying upon *intention* as the law of the instrument, and the liberal rectifier of all blunders.

There cannot, indeed, be a greater mistake than that of supposing that a very small stock of legal terms, added to a very ordinary education, suffices to accomplish the will-maker. On the contrary, a will is alone capable of exhausting the science and ingenuity of the most able conveyancer. It may embrace every allowable modification of property, every possible scheme of disposition. As it is the duty of the will-maker (at least of the solicitor undertaking that office) not merely to draw, but to advise, he should be conversant as well with the various modes, as with the various forms of gift; prepared alike to suggest the aptest kind of destination, and to effect it by the aptest words. Even of those testators whose wills are prepared under professional advice, it may be safely affirmed, that, while the intentions of not a few are frustrated by failure in point of expression, the intentions of a far greater number are never elicited by presenting to their consideration the arrangements most suitable to their views and circumstances. In a large proportion of cases the nature, as well as the language, of the disposition is determined not by the deliberate choice of the person who makes the gift, exercised over the various modes in which the law allows him to direct the enjoyment of his property after his decease, but by the extent of the knowledge possessed by the person who prepares the instrument, which may therefore be said to exhibit the *mind* of the framer rather than the *will* of the testator.

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* 2 Bulst. 230.

On the other hand, it must be admitted that the blame of miscarriage is not unfrequently attributable to the testator himself. Want of explicitness or candour in the communication of the actual state of his property or circumstances, or an obstinate attachment to some favourite project, may render abortive the most judicious advice. A short-sighted economy, too, which calculates the present fee and disregards the ravages of a posthumous Chancery suit, frequently obliges the practitioner to rely upon his own powers when he would willingly avail himself of experienced counsel.

So far as the mischief springs from the loose exposition of testamentary instruments, we have everything to hope from greater firmness in the judicature. So far as unskilful penning is its source, we must look to the increase of knowledge and tact in the practitioner. These it is the object of the following sheets to promote, by furnishing him with some useful suggestions, and guarding him against some not unfrequent errors. With respect to the testator himself, indeed, the evil has its root in human nature; yet, even here, some good may be expected to result from setting before him a few simple and rational forms of disposition, with the consequences of indulgence in complicated schemes and capricious humours.

As an eminent conveyancer has often been heard to declare, that of all the duties which devolved upon his department of the Profession, that of drawing or settling a will is the most thankless and unprofitable, while it is well known that one-half, at least, of the cases laid before counsel arise out of informal wills, the preceding remarks must stand above the suspicion of seeking to attract this responsible branch of practice to the chambers of the regular draughtsman. The authors trust, indeed, that their joint labours bear internal evidence of an anxiety to assist in delivering wills from the necessity of frequent resort to counsel or to courts, by putting plain directions into the hands of the general practitioner. They are not, however, vain enough to think that no error has been admitted into the following sheets capable of producing the evils which they deprecate.

January 7, 1835.

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THE WILLS ACT.

1 VICT. CHAP. 26.

An Act for the Amendment of the Laws with respect to Wills.

[3rd July, 1837.]

EXPLANATION OF TERMS.

[BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That] the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King *Charles* the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in Capite *and by Knights Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof*, or by virtue of an Act passed in the parliament of *Ireland* in the fourteenth and fifteenth years of the reign of King *Charles* the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in Capite *and by Knights Service*, and to any other testamentary disposition; and the words "real estate" shall extend to manors,

Meaning of certain words in this Act (*a*).

"Will."

12 Car. 2, c. 24.

14 & 15 Car. 2 (1).

"Real estate:"

(*a*) The marginal notes form no part of the statute, and are not binding as an explanation or construction of the sections, *Claydon* v. *Green*, L. R. 3 C. P. 511; 37 L. J. C. P. 226; *Sutton* v. *Sutton*, 22 Ch. D. 511; 52 L. J. Ch. 333. In this edition the marginal notes and punctuation of the Act are taken from the Statutes at Large. The initial words from "Be it" to "same That" were repealed by the Statute Law Revision Act, 1893, and are here placed in brackets.

Marginal notes.

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advowsons, messuages, lands, tithes, rents, and hereditaments, whether freeholds, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"Personal estate:"

Number.

Gender.

REPEAL CLAUSE.

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II. [Repealed by 37 & 38 Vict. c. 35.]

GENERAL ENABLING CLAUSE.

Sect. 3.

All property may be disposed of by will.

III. And be it further enacted, That it shall be lawful for every person (*a*) to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate, and all personal estate (*b*) which he shall be entitled to, either at law or in equity (*c*), at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor (*d*), or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold (*e*), notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof,

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and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent (*f*), executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will (*g*).

Alien, or person domiciled abroad.

(*a*) The subject of the wills of aliens and of British subjects domiciled abroad is treated of in the second Appendix, *post*, p. 407, to which the reader is referred for fuller information.

The following points as to aliens may be briefly noted here:—

By the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), s. 17, "real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject. Provided that . . . this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled either mediately or immediately in possession or expectancy in pursuance of any disposition made before the 12th day of May, 1870, or in pursuance of any devolution by law on the death of any person dying before that day."

But the will of a foreigner dying domiciled abroad will not be admitted to probate in the United Kingdom, nor have any operation upon movable property in the United Kingdom, although such will may be executed in accordance with the provisions of the Wills Act, unless it is validly executed according to the requirements of the law of the testator's domicile, *In b. Von Buseck*, 6 P. D. 211; 51 L. J. P. 9; *Bloxam* v. *Favre*, 9 P. D. 130; 53 L. J. P. 26.

The validity of a will dealing with immovable property situate in the United Kingdom, by whomsoever made, and wheresoever executed, is wholly governed by the ordinary testamentary law of that part of the United Kingdom in which such immovable property is situate; Dicey, Conflict of Law, 500. It is to be observed that the distinction is not between *real* property and *personal* property, but between *movable* property and *immovable* property. Leaseholds are *immovables*

Legatee of chose in action sues in name of executor.

(*b*) By this section the practice is not altered with respect to suing at law upon a chose in action bequeathed to a legatee; see *Bromage* v. *Lloyd*, 1 Ex. 32; 16 L. J. Ex. 257; and *Bishop* v. *Curtis*, 17 Jur. 23; 21 L. J. Q. B. 391; in which cases it was held that the specific legatee of

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a promissory note, though the executors assent to the bequest, cannot sue upon the note. The executors only are entitled to sue.

What interests devisable.

(*c*) A person in possession of land without other title has a devisable interest, *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; 35 L. J. Q. B. 17. A purchaser who has made, but not signed, a contract for the purchase of real estate, the terms of which are proved, and which is signed by the vendor, has a devisable interest in that estate, *Morgan* v. *Holford*, 1 S. & G. 101. And a person who has sold and conveyed an estate in circumstances which entitle him in equity to have the sale set aside, has in the estate an interest of such a nature as to be devisable, *Stump* v. *Gaby*, 2 D. M. & G. 623; 22 L. J. Ch. 352; *Gresley* v. *Mousley*, 4 De G. & J. 78; 28 L. J. Ch. 620.

(*d*) The section of the Statute of Frauds which required the execution of a will of freehold estate to be attested by three or four witnesses, was with other Acts repealed by sect. 2, "except so far as the same Acts relate to any wills to which this Act does not extend" and sect. 3 applies only to the devise of property which, if not so devised, would devolve upon the heir-at-law or customary heir of the testator or his ancestor, or upon the executor or administrator of the testator. Upon the construction of these clauses it was doubted whether, in the case of a testator dying without heirs, it would not, to prevent an escheat to the lord, be necessary that the will should be executed pursuant to the old law. But see *Wentworth* v. *Humphrey*, 11 App. Cas. 619; 55 L. J. P. C. 66; and *In b. Hartley*, [1899] P. 40; 68 L. J. P. 16; where the Law Officers do not appear to have been aware of the decision in *Wentworth* v. *Humphrey*. By sect. 178 of the Law of Property Act, 1925, it is now provided:—

> **178.** Section three of the Wills Act, 1837, shall (without prejudice to the rights and interests of a personal representative) authorise and be deemed always to have authorised any person to dispose of real property or chattels real by will notwithstanding that by reason of illegitimacy or otherwise he did not leave an heir or next of kin surviving him.

In the case of persons dying after 1925, escheat for want of heirs is abolished by sect. 45 (1) (d) of the Administration of Estates Act, 1925.

Copyholds.

(*e*) The effect of this section was to enable a copyholder in every case to devise his estate without a surrender to the use of his will; and to defeat his widow's right to freebench, *Lacey* v. *Hill*, L. R. 19 Eq. 346; 44 L. J. Ch. 215; but the estate remained in the customary heir until the admittance of the devisee. Consequently, where a copyholder devised to trustees, who did not disclaim, but tendered for admittance the customary heir, whom the lord refused to admit on account of the devise, though the Court would not grant a mandamus to compel the lord to admit the heir, *Reg.* v. *Garland*, L. R. 5 Q. B. 269; 39 L. J. Q. B. 86; yet the lord having refused to admit the heir could not seize for want of a tenant, *Garland* v. *Mead*, L. R. 6 Q. B. 441; 40 L. J. Q. B. 179. By virtue of sect. 128 of the Law of Property Act, 1922, and the Law of Property Act Postponement Act, 1924, all land of copyhold or customary tenure becomes enfranchised from and after the year 1925.

Dower.

By the Dower Act, 3 & 4 Will. 4, c. 105, s. 4, it was enacted that no widow should be entitled to dower out of any land which should have been absolutely disposed of by her husband in his lifetime or by his will.

But by sect. 45 of the Administration of Estates Act, 1925, dower is abolished in the case of every person dying after 1925.

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Contingent estates.

(*f*) Under both the old and the present law a contingent fee under a shifting clause is devisable, even though the contingency happen after the death of the testator, and is of such a nature that he, personally, could never have derived any benefit from it, *Ingilby* v. *Amcotts*, 21 Be. 585; 25 L. J. Ch. 769. See also sect. 4 (2) of the Law of Property Act, 1925.

(*g*) Compare sect. 24, and the note thereto as to what property may be disposed of by will. A new power, namely, to dispose by will of entailed estates as if the entail had been barred, is now conferred upon testators who execute, confirm or republish a will after 1925, by sect. 176 of the Law of Property Act, 1925, which provides:—

176.—(1) A tenant in tail of full age shall have power to dispose by will, by means of a devise or bequest referring specifically either to the property or to the instrument under which it was acquired or to entailed property generally—

(a) of all property of which he is tenant in tail in possession at his death; and

(b) of money (including the proceeds of property directed to be sold) subject to be invested in the purchase of property, of which if it had been so invested he would have been tenant in tail in possession at his death;

in like manner as if after barring the entail he had been tenant in fee-simple or absolute owner thereof for an equitable interest at his death, but, subject to and in default of any such disposition by will, such property shall devolve in the same manner as if this section had not been passed.

(2) This section applies to entailed interests authorised to be created by this Act as well as to estates tail created before the commencement of this Act, but does not extend to a tenant in tail who is by statute restrained from barring or defeating his estate tail, whether the land or property in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services or not, or to a tenant in tail after possibility of issue extinct, and does not render any interest which is not disposed of by the will of the tenant in tail liable for his debts or other liabilities.

(3) In this section "tenant in tail" includes an owner of a base fee in possession who has power to enlarge the base fee into a fee-simple without the concurrence of any other person.

(4) This section only applies to wills executed after the commencement of this Act, or confirmed or republished by codicil executed after such commencement.

FEES ON COPYHOLDS.

Sect. 4.

As to the fees and fines payable by devisees of customary and copyhold estates.

IV. Provided always, and be it further enacted, That where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of

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money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

COPYHOLDS.

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Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

V. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as

and the lord to be entitled to the same fine, &c., when such estates are not now devisable as he would have been from the heir.

he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent (*a*). Sect. 5.

(*a*) After the year 1925 all land of copyhold or customary tenure is enfranchised by virtue of sect. 128 of the Law of Property Act, 1922, and the Law of Property Act Postponement Act, 1924.

ESTATES PUR AUTRE VIE.

VI. And be it further enacted, That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (*a*). Sect. 6. Estates *pur autre vie*.

(*a*) Under this section the legal personal representative of the deceased owner of estates *pur autre vie* is entitled to those estates, not only in the case where no special occupant is named in the limitations, but also in the case where a special occupant is named but never comes into existence. See *Reynolds* v. *Wright*, 2 D. F. & J. 590; 30 L. J. Ch. 381; in which case the devise was of leaseholds for lives to trustees, in trust for "A. and his heirs:" A. died intestate and illegitimate; and it was held that the leaseholds belonged to the administrator of A., and not beneficially to the devisees in trust. There may be a special occupant of an equitable estate *pur autre vie* as well as of a legal estate, *Reynolds* v. *Wright, ubi sup.* See also as to estate *pur autre vie*, *Northen* v. *Carnegie*, 4 Drew. 587; 28 L. J. Ch. 930; *Pickersgill* v. *Grey*, 30 Be. 352; 31 L. J. Ch. 394; *Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192; 41 L. J. Ch. 255; *Milner* v. *Harewood*, 18 Ves. 259, 273; *Re Sheppard*, [1897] 2 Ch. 67; 66 L. J. Ch. 445; *Re Inman*, [1903] 1 Ch. 241; 72 L. J. Ch. 120. Estates *pur autre vie*, where a special occupant, though named, never comes into existence.

In the case of a person dying after the year 1925 an estate *pur autre vie* will vest in his personal representatives under sect. 1 of the Administration of Estates Act, 1925, but by virtue of sub-sects. (1) and (3) of sect. 1 of the Law of Property Act, 1925, the personal representatives will only have an equitable interest.

AGE OF TESTATOR.

VII. And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid (*a*). Sect. 7. No will of a minor valid;

(*a*) A will made by an infant does not become operative by his

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subsequently attaining his majority; Sugd. R. P. Stat. 330. This section deprived an infant of the power which he formerly enjoyed of appointing by will guardians of his infant children under 12 Car. 2, c. 24.

An infant attains his full age at the end of the day preceding the twenty-first anniversary of his birth, and from the beginning of such preceding day he is deemed to have attained it; 1 Salk. 44; *Re Shurey*, [1918] 1 Ch. 263; 87 L. J. Ch. 245. And see note (*e*) to Prec. 12, *post*.

By various statutes passed from time to time relating to friendly societies, industrial and provident societies, savings banks, trade unions, &c., infants have been empowered, upon attaining sixteen years of age, to make nominations in the nature of testamentary dispositions of their shares and interests in such societies, &c., not exceeding £100. See as to friendly societies, the Friendly Societies Act, 1896, s. 56; as to industrial and provident societies, the Industrial and Provident Societies (Amendment) Act, 1913, s. 5; as to trade unions, the Trade Union Act Amendment Act, 1876, s. 10, as amended by the Provident Nominations and Small Intestacies Act, 1883; as to trustee savings banks, the Trustee Savings Banks Act, 1863, ss. 41 and 42, and 50 & 51 Vict. c. 40, s. 3; as to Government Annuities, the Government Annuities Act, 1882, s. 6, subhead (e), as amended by the Provident Nominations and Small Intestacies Act, 1883, s. 3. As to the validity of a nomination paper, when the property disposed of exceeds £100, see *In b. Baxter*, [1903] P. 12; 72 L. J. P. 2; *Griffiths* v. *Eccles Provident, Industrial, Co-operative Society, Lim.*, [1912] A. C. 483; 81 L. J. K. B. 594.

MARRIED WOMEN.

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nor of a *feme covert*.

VIII. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act (*a*).

Testamentary capacity of married woman.

(*a*) The effect of this section was to leave the legal testamentary capacity of a married woman (who has attained the age of twenty-one years) exactly as it stood under the old law, which still holds good as regards all property acquired before 1883, other than her separate estate, by a woman married before that date. Thus a married woman's devise of real estate before 1883, as before 1838, must have been made in the exercise of a power created for the purpose; and her capacity to bequeath personalty not settled to her separate use must have been derived from an agreement before marriage, or an agreement made after marriage for consideration, or the assent, either before or after her death, of her husband who survives her: 1 Jarm. Wills, p. 54. The Wills Act gave her no new power (Sudg. R. P. Stat. 331), but this section (sect. 8) does not operate to exclude the wills of married women, made in exercise of a testamentary power of appointment, from the operation of sect. 24, as to a will speaking as if executed immediately before the testator's death, or of sect. 27, as to a general gift operating as an execution of a power. Therefore a will made by a married woman, in the exercise of a testamentary power, may have an effect, by virtue of sects. 24 and 27, greater than it would have had before the statute, *Thomas* v. *Jones*, 1 D. J. & S. 63; 32 L. J. Ch. 139. A will made by a married woman who survived her husband, not re-executed during widowhood, had no greater effect

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than it would have had if she had died before her husband, and did not pass property acquired after his death, *Willock* v. *Noble*, L. R. 7 H. L. 580; 44 L. J. Ch. 345. Compare the note to sects. 24, 27.

By the Married Women's Property Act, 1882, a married woman is capable of disposing by will of any real or personal property, being her separate estate, in the same manner as if she were a *feme sole* (sect. 1); every woman who marries after the commencement of the Act, January 1, 1883, is entitled to hold as her separate property, and to dispose of in manner as aforesaid, all real and personal property belonging to her at the time of her marriage, or acquired by or devolving upon her after marriage (sect. 2); and every woman married before the commencement of the Act is entitled to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrues after the commencement of the Act (sect. 5). The effect of sect. 5 of this Act is that if a married woman, married before 1883, acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property before the commencement of the Act, such property does not, upon falling into possession since the Act came into operation, become her separate property, *Reid* v. *Reid*, 31 Ch. D. 402; 55 L. J. Ch. 294.

45 & 46 Vict. c. 75.

By the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3, it is enacted that "section 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband." Sect. 3 of the Married Women's Property Act, 1893, applies to every will of a married woman who dies after the date of the Act (December 5, 1893), *Re Wylie*, [1895] 2 Ch. 116; 64 L. J. Ch. 613; and it operates upon all that she has at her death, *Re James*, [1910] 1 Ch. 157; 79 L. J. Ch 45.

EXECUTION OF WILLS.

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Every will to be in writing, and signed in the presence of two witnesses.

IX. And be it further enacted, That no will shall be valid unless it shall be in writing (*a*) and executed in manner hereinafter mentioned (*b*); (that is to say,) it shall be signed at the foot or end thereof (*c*) by the testator (*d*), or by some other person in his presence and by his direction (*e*); and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time (*f*), and such witnesses shall attest (*g*) and shall subscribe the will in the presence of the testator (*h*), but no form of attestation shall be necessary (*i*).

Will—upon what substance and how to be written.

(*a*) A will may be written upon any substance, and with any material; but it is advisable that it should be written on vellum, parchment, or paper (Shep. Touch. 54); and to prevent any doubt or question as to the authenticity of the document, the writing should throughout be by the same hand and in ink of one colour, *Greville* v. *Tylee*, 7 Moo. P. C. 320; 83 R. R. 57; *Birch* v. *Birch*, 1 Rob. 675; and see *In b. Bacon*, 3 No. Cas. 645.

Formerly, pencil writings, as distinguished from writings in ink were

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Will may be written in pencil.

held to be deliberative; Deane, Wills, 73. But under this statute a will may be written and signed in pencil; Sugd. R. P. Stat. 351, 352; *Gregory* v. *Queen's Proctor*, 4 No. Cas. 620; *Kell* v. *Charmer*, 23 Be. 195. In *Bateman* v. *Pennington*, 3 Moo. P. C. 223, Lord Brougham said, "All the cases show that the signing in pencil affords a *prima facie* presumption that the act is only deliberative; yet it may be shown to be otherwise." In that case the testator had filled up the date of his will, and also signed it, in pencil, the body of the will being in ink; his signature was preceded by the words, "In case of accidents I sign this my will"; the testator died suddenly, and probate was allowed of the will so executed. As to pencil alterations in a will which was confirmed by a codicil, see *In b. Hall*, L. R. 2 P. & D. 256; 40 L. J. P. 37.

Printed will good.

A will may be printed or lithographed: Interpretations Act, 1889 (52 & 53 Vict. c. 63), s. 20. A will the body of which is printed from type, or partly written and partly printed, is valid (see 2 Rob. 115, n.). In *In b. Adams*, L. R. 2 P. & D. 367; 41 L. J. P. 31, the blanks in a printed form were filled up partly in ink and partly in pencil, some portion of the writing in ink extending over that in pencil, and some words of the latter having been rubbed out and obliterated; the words in pencil were held to be deliberative only, and were excluded from probate.

In words or cypher.

A will may be written or printed in any language, and either in words at length or contracted, or in figures, so that the testator's wishes are clear and unambiguous (Deane, Wills, 73); or in numbers and letters explained by a key, *East* v. *Twyford*, 4 H. L. C. 517; 94 R. R. 222; or private marks to be interpreted by extrinsic evidence, *Kell* v. *Charmer*, 23 Be. 195.

Foreign language.

If a will be in a foreign language, resort must be had to the foreign law or language for the purpose of deciding on the meaning of the particular words used in the will; but having so ascertained the meaning of the terms, the law of the testator's domicile governs the construction of the instrument so far as concerns personal estate, see *Martin* v. *Lee*, 14 Moo. P. C. 142, explained in *McGibbon* v. *Abbott*, 10 App. Cas. 653; 54 L. J. P. C. 39; also *Re Cliff's Trusts*, [1892] 2 Ch. 229; 61 L. J. Ch. 397. See the note on Domicile, in the Appendix. In the case of a testator dying domiciled abroad, where the original will has been proved in the Court of the domicile, an office or properly authenticated copy of it is received in place of the original for the purpose of being admitted to probate here, see Tristram & Coote's Probate Practice, 14th ed., pp. 50, 54.

Form unimportant.

Draft upon a banker.

Deed

Letter.

An instrument, whatever may be its form, from which the intention of the maker can be gathered, that it is to affect the destination of his property after his death, will, if properly attested, be held to be testamentary; for example, an order upon testator's bankers, attested by two witnesses, *Jones* v. *Nicolay*, 2 Rob. 293; *In b. Marsden*, 1 Sw. & Tr. 542; a duly attested instrument in the form of a deed, *In b. Montgomery*, 5 No. Cas. 99; *Doe* v. *Cross*, 8 Q. B. 714; 15 L. J. Q. B. 217; *In b. Morgan*, L. R. 1 P. & D. 214; 35 L. J. P. 98; *Milnes* v. *Foden*, 15 P. D. 105; 59 L. J. P. 62; *In b. Slinn*, 15 P. D. 156; 59 L. J. P. 82; *Foundling Hospital* (*Governors and Guardians*) v. *Crane*, [1911] 2 K. B. 367; 80 L. J. K. B. 853; or a letter, *In b. Mundy*, 2 Sw. & Tr. 119; 30 L. J. P. 85; or a list of names and sums of money, *Re Barrance*, [1910] 2 Ch. 419; 79 L. J. Ch. 544. And the testator's intention that such an instrument should operate as a will may be proved by parol evidence, *Jones* v. *Nicolay*, *ubi sup.*; *In b. Marsden*, *ubi sup.*; *In b. Webb*, 3 Sw. & Tr.

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482; 33 L. J. P. 182; *In b. English*, 3 Sw. & Tr. 586; 34 L. J. P. 5; *Cock v. Cooke*, L. R. 1 P. & D. 241; 36 L. J. P. 5; *Robertson* v. *Smith*, L. R. 2 P. & D. 43; 39 L. J. P. 41; *In b. Coles*, L. R. 2 P. & D. 362; 41 L. J. P. 21; *In b. Slinn*, 15 P. D. 156; 59 L. J. P. 82. But where a person claims probate of a paper signed and attested, but not on the face of it clearly testamentary, the burden of proof is on that person to satisfy the Court that it was executed *animo testandi*; *Thorncroft* v. *Lashmar*, 2 Sw. & Tr. 479; 31 L. J. P. 150; *In b. Slinn, ubi sup.*; and see *Patch* v. *Shore*, 2 Dr. & S. 589; 32 L. J. Ch. 185. See also Jarm. Wills. Ch. 2.

Document not executed *animo testandi.*

An excellent illustration of a document not executed *animo testandi*, and therefore not admissible to probate as testamentary, is afforded by the case of *Coventry* v. *Williams*, 3 Cur. 787. In that case testator executed under his hand and seal a document attested by two witnesses which, so far as material, was in the terms following: "I have determined to offer to Mrs. C. . . . the following small pittance, that poverty may never overtake her. I shall immediately order Mr. M., who has made my will, to make the following codicil to it. That . . . she shall enjoy from me the . . . allowance of £50 per annum to be paid by Messrs. Coutts & Co., Bankers, Strand, half-yearly, quarterly, or annually, as she shall will it, and after her death to her son. Given under my hand and seal, &c." There was no extrinsic evidence in this case that the document was intended by the testator to be testamentary. It will be noted that the allowance was to be paid by the testator's bankers, and not by his executors, and that it was not in terms testamentary.

Where the intention to execute the identical testamentary document propounded was completely absent, the wrong paper having been executed by mistake, probate was refused of the whole document, although it contained certain dispositions in fact intended by the testatrix, *In b. Meyer*, [1908] P. 353; 77 L. J. P. 150.

Not revocable.

It is of the essence of a testamentary paper that it should be revocable. A document which is not revocable, but comes into operation in the testator's lifetime, cannot be admitted to probate, *In b. Robinson*, L. R. 1 P. & D. 384; 36 L. J. P. 93.

As to whether probate can be granted of an instrument of which a part only is testamentary, see *In b. Robinson, ubi sup.*; *In b. Heywood*, [1916] P. 47; 85 L. J. P. 24.

Clause introduced by fraud, or *per incuriam.*

Where a clause is introduced into a will by fraud, *Allen* v. *M'Pherson*, 1 H. L. C. 191, or *per incuriam*, the testator not having given instructions for and being ignorant of the existence of such clause, *In b. Duane*, 2 Sw. & Tr. 590; 31 L. J. P. 173; *In b. Oswald*, L. R. 3 P. & D. 162; 43 L. J. P. 24, it forms no part of the will of the testator, and probate will be granted of the remainder, if the two are separable; but where the rejection of part alters the sense of the remainder, *qu.* whether there is a will; *Rhodes* v. *Rhodes*, 7 App. Cas. 192; 51 L. J. P. C. 53. In *In b. Boehm*, [1891] P. 247; 60 L. J. P. 80, the will contained two similar clauses, by each of which the testator had, according to the instructions for the will, intended benefiting one of his daughters, Georgiana and Florence, but by mistake the name of Georgiana had been inserted in the will in both the clauses, thus leaving Florence unprovided for. The will had not been read over to the testator at any time. Probate was granted, omitting the name of Georgiana in the second clause of gift, although the will with the blank space where Florence's name was intended to be

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would not be left as the testator had intended it should be. Where a duly executed and attested codicil had been read over to a capable testatrix, the Court refused to exclude from probate certain words inserted in it, and which were not in accordance with the instructions given by her to her solicitor, nor were contained in the draft codicil, which had been read over to and approved by her, although the solicitor who prepared the codicil swore that they had been inserted without instructions from her, and by his inadvertence, *Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109; 35 L. J. P. 116; and in *Harter* v. *Harter*, L. R. 3 P. & D. 11; 42 L. J. P. 1, it was held that, however clearly an error is proved, unless words have been inserted by fraud, or by mistake without the knowledge of the testator, the Court of Probate cannot correct it, either by the omission of words or the insertion of other words, inasmuch as to do so would be to make a new will for the testator. In *In b. Bushell*, 13 P. D. 7; 57 L. J. P. 16, and in *In b. Huddlestone*, 63 L. T. 255, the Court allowed certain words to be struck out and others to be inserted, but this practice was clearly wrong and will not be followed: *In b. Schott*, [1901] P. 190; 70 L. J. P. 46. In *Morrell* v. *Morrell*, 7 P. D. 68; 51 L. J. P. 49, the word "forty" occurring in four places in a will was struck out on proof being given that it had been inserted by inadvertence, but no other word was substituted for it. In both the cases of *Bushell* and *Morrell* the clauses had not been read over to the testator, but it was laid down by the House of Lords in *Fulton* v. *Andrew*, L. R. 7 H. L. 448; 44 L. J. P. 17, that there is no unyielding rule of law that all further inquiry is shut out by proof that a testator competent in mind has had the will read over to him, and has thereupon executed it. See also *Garnett Botfield* v. *Garnett Botfield*, [1901] P. 335; 71 L. J. P. 1; *Vaughan* v. *Clerk*, 87 L. T. 144; *Brisco* v. *Baillie Hamilton*, [1902] P. 234; 71 L. J. P. 121; and *Gregson* v. *Taylor*, [1917] P. 256; 86 L. J. P. 124.

In *Collins* v. *Elstone*, [1893] P. 1; 62 L. J. P. 26, a testatrix left two wills, and a codicil to the first will. The second will, which disposed only of a small policy of insurance on her life, was prepared for her on a printed form by one of her executors. The form began with a cause revoking all previous testamentary dispositions; but when this was read over to her she objected to it, saying that she did not wish to revoke her first will and codicil. The person who prepared the will assured her that, as it only related to the insurance policy, the words of revocation would not apply to her former testamentary dispositions, and that to make an erasure might invalidate the will. Being satisfied by this assurance, the testatrix executed the will. *Held*, that the testatrix must be taken to have known and approved of those words of revocation, and that they must be included in the probate of the last will.

It may be usefully noted here that any attack upon a will or codicil or any clause thereof upon the ground of fraud or undue influence should be made in the Probate Division: after probate the Chancery Division does not entertain any such case, *Meluish* v. *Milton*, 3 Ch. D. 27; 45 L. J. Ch. 836; *Pinney* v. *Hunt*, 6 Ch. D. 98.

A testamentary paper duly executed is entitled to probate, although not intended to operate, and not becoming operative, until some time after the testator's death, *In b. Newns*, 7 Jur. (N.S.) 688.

A duly executed paper, testamentary on the face of it, may be excluded from probate by parol evidence clearly proving that it was

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not intended by the deceased to affect the disposition of his property after his death, *Lister* v. *Smith*, 3 Sw. & Tr. 282; 33 L. J. P. 29.

Contingent will.

A will may be made to take effect on a contingency; if the contingency does not happen, the will ought not to be admitted to probate (Jarm. Wills, 40), and is inoperative to revoke a prior will, *In b. Hugo*, 2 P. D. 73; 46 L. J. P. 21. A testator wrote a codicil concluding thus, "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary"; the wife elected not to avail herself of the codicil, and it was not admitted to probate, *In b. Smith*, L. R. 1 P. & D. 717; 38 L. J. P. 85. See also *In b. Porter*, L. R. 2 P. & D. 22; 39 L. J. P. 12; *In b. Robinson*, L. R. 2 P. & D. 171; 40 L. J. P. 16; and *Lindsay* v. *Lindsay*, L. R. 2 P. & D. 459; 42 L. J. P. 32. But the Court is unwilling to refuse probate unless it is clear that the testator intended the will to be operative only in a certain event or during a certain period, *In b. Dobson*, L. R. 1 P. & D. 88; 35 L. J. P. 54. See the considered judgment of Sir F. Jeune, in *In b. Spratt*, [1897] P. 28; 66 L. J. P. 25, in which the previous cases are reviewed. See also *Halford* v. *Halford*, [1897] P. 36; 66 L. J. P. 29. Merely equivocal words will not suffice, *In b. Mayd*, 6 P. D. 17; 50 L. J. P. 7: and a will, contingent in terms, but executed after the event, is thereby rendered absolute, *In b. Cawthron*, 3 Sw. & Tr. 417; 33 L. J. P. 23. Unattested memoranda, written subsequently to the execution of the will, will not be admitted as evidence of the contingent nature of the will, *Stockwell* v. *Ritherdon*, 1 Rob. 661. A will expressed to take effect only upon an event which does not happen cannot be established by evidence of the testator's intention to adhere thereto, *In b. Winn*, 2 Sw. & Tr. 147; *Roberts* v. *Roberts*, 2 Sw. & Tr. 337; 31 L. J. P. 46; but a codicil expressed to take effect only upon an event which does not happen may operate as a re-execution of a will therein referred to, and on that account may be entitled to probate, *In b. Da Silva*, 2 Sw. & Tr. 315; 30 L. J. P. 171. In the case of *Doe* v. *Haslewood*, 10 C. B. 544, the testator made his will in favour of a nephew, but with a proviso in favour of the child with which his wife was then pregnant, if such child should be born after the testator's death; the child was, in fact, born in the testator's lifetime, and the Court held that, in such a case, the testator did not contemplate the birth of a child in his lifetime, and did not intend to provide by his will for a child so born; the proviso in the will was made in contemplation of a particular combination of circumstances, which not having happened, the proviso failed. See, however, Jarm. Wills, 677.

Blanks.

Wills of more than one sheet are usually written on one side only of brief paper, the sheets being fastened together (though this fastening is not absolutely necessary, *Gregory* v. *Queen's Proctor*, 4 No. Cas. 620) at one of the corners, the back of each sheet being left blank. To this plan there is no objection, as the Act does not require a will to be written continuously, *In b. Corder*, 1 Rob. 669. And even if there is a blank in the body of the writing as in *Corneby* v. *Gibbons*, 1 Rob. 705, where the blank left was half a page, the will is valid; see also *Kirby's Case*, 6 No. Cas. 693. This shows the weakness of the objection which, before the passing of 15 & 16 Vict. c. 24 (*post*), was raised to a space being left between the conclusion of the will and the signature (Sugd. R. P. Stat. 335). And if a will is prepared with blanks, and those blanks are filled up in the handwriting of the testator, the presumption of law is that they were supplied before the execution of the will, *Birch* v. *Birch*, 1 Rob. 675.

Blanks filled up in testator's handwriting.

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As already stated, a complete blank in a will cannot be filled up, but parol evidence may be resorted to in order to explain, with reference to a partial blank, words which of themselves have a reasonable meaning, *In b. Hubbuck*, [1905] P. 129; 74 L. J. P. 58.

Construction where probate has been granted in blank.

When probate has been granted of a will containing blank spaces, the court of construction has no power to fill up the blank spaces, so as to make sense of that which, without such alteration, is nonsense, unless from some other portions of the will, or upon the construction of the will as a whole, the Court can see in what manner the testator intended to fill up the blanks. A court of construction, for this purpose, will look at the original will, and not merely at the probate, *Re Harrison*, 30 Ch. D. 390; 55 L. J. Ch. 799; *Taylor* v. *Richardson*, 2 Drew. 16; 23 L. J. Ch. 9. See also *Mason* v. *Bateson*, 26 Be. 404; 28 L. J. Ch. 391; *Edmunds* v. *Waugh*, 4 Drew. 275; *Greig* v. *Martin*, 7 W. R. 315.

Where a will contained the words, "I appoint R. H. B. and J. E. W.," it was held that the rest of the will showed that the testator must have intended to appoint them executors, and probate was granted to them, *In b. Bradley*, 8 P. D. 215; 52 L. J. P. 101.

Incorporation of documents in existence, and clearly identified.

Any written document in existence at the execution of a will, *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342; 31 L. J. P. 49; *In b. M'Cabe*, 2 Sw. & Tr. 474; 31 L. J. P. 190; *Van Straubenzee* v. *Monck*, 3 Sw. & Tr. 6; 32 L. J. P. 21, may be incorporated with, and made part of, the will, *Allen* v. *Maddock*, 11 Moo. P. C. 427; *Ferraris* v. *Marquis of Hertford*, 3 Cur. 468; *In b. Daniell*, 8 P. D. 14; 52 L. J. P. 23. But the incorporated instrument must be clearly identified, *Allen* v. *Maddock*, *sup.*; *In b. Drummond*, 2 Sw. & Tr. 8; *In b. Brewis*, 3 Sw. & Tr. 473; 33 L. J. P. 124; *In b. Tovey*, 47 L. J. P. 63; *Singleton* v. *Tomlinson*, 3 App. Cas. 404. For the purpose of such identification parol evidence was before 1838, and is now, admissible, *Allen* v. *Maddock*, *sup.*; *Re White*, [1925] 1 Ch. 179; and if, in the existing circumstances, the identity is proved, it is no objection that, by possibility, circumstances might have existed in which the instrument could not have been identified, *ib.* But the principle of *Allen* v. *Maddock* will not be extended, *In b. Greves*, 1 Sw. & Tr. 250; 28 L. J. P. 18. See also *In b. McGregor*, 60 L. T. 840; *University College of North Wales* v. *Taylor*, [1908] P. 140; 77 L. J. P. 20. If the will does not describe the document as then existing parol evidence will not be admitted to prove its existence, *In b. Dallow*, L. R. 1 P. & P. 189; 35 L. J. P. 81; *In b. Sunderland*, L. R. 1 P. & D. 198; 35 L. J. P. 82. But where a will, if read as speaking at the date of a codicil, contains language which would operate as an incorporation, the document, though not in existence until after the execution of the will is entitled to probate by force of the codicil, *In b. Lady Truro*, L. R. 1 P. & D. 201; 35 L. J. P. 89; *In b. Hunt*, 2 Rob. 622; *In b. Stewart*, 4 Sw. & Tr. 211; *In b. Rendle*, 68 L. J. P. 125; *In b. Green*, 79 L. T. 738. But see *In b. Warner*, 10 W. R. 566; *In b. Reade*, [1902] P. 75; 71 L. J. P. 45; *In b. Smart*, [1902] P. 238; 71 L. J. P. 123.

Parol evidence admissible.

In *In b. Marchant*, [1893] P. 254; 62 L. J. P. 114, a testatrix left two testamentary documents of which only one was duly executed. The first or unexecuted document made various specific bequests, and appointed an executor. The second, which was duly executed, bequeathed all the property of the testatrix to her nephew "for the purposes I require him to do absolutely." *Held*, that the two documents could not be admitted to probate as together constituting the will of the deceased, but probate was granted of the second document with directions to the

executor to administer the estate in conformity with the trusts of the first document. But where the will desired and *empowered* a disposition "in accordance with my wishes verbally expressed," parol evidence was not admitted and the power of disposition was void for uncertainty, *Re Hetley*, [1902] 2 Ch. 866; 71 L. J. Ch. 769. As to parol evidence where the will shows the existence of a trust, see *Re Gardom*, [1914] 1 Ch. 662, 669; 83 L. J. Ch. 681; affirmed [1915] W. N. 216.

Incorporation by the words "ratify and confirm."

The words "ratify and confirm" used by a testator in his will are sufficient to render a deed of settlement to which they are applied entitled to probate as part of the will, *Sheldon* v. *Sheldon*, 1 Rob. at p. 89; see also *Stump* v. *Gaby*, 2 D. M. & G. 623; 22 L. J. Ch. 352; and *In b. Harris*, L. R. 2 P. & D. 83; 39 L. J. P. 48, where a will disposing only of property in Tasmania and appointing executors in Tasmania was ratified and confirmed by a subsequent will disposing of property in England and appointing different executors in England, and the Court ordered probate to issue of both, as together constituting the will of the deceased. And see *In b. Howden*, 43 L. J. P. 26; *In b. Lockhart*, 69 L. T. 21.

Incorporated instruments may be invalid of themselves.

It is unimportant that the incorported document is voidable or invalid. See cases already referred to, and *Stump* v. *Gaby*, *supra*; *In b. Smartt*, 4 No. Cas. 38; *Swete* v. *Pidsley*, 6 No. Cas. 189; *In b. Willesford*, 3 Cur. 77. Indeed, it is the invalidity of the document standing alone which generally necessitates its incorporation in the probate. In *In b. Bosanquet*, 14 Jur. 964, an unattested document, purporting to exercise a power of appointment, was held to be incorporated with a will; in *In b. Mercer*, L. R. 2 P. & D. 91; 39 L. J. P. 43, an unattested copy of a will made in India, and in *In b. Heathcote*, 6 P. D. 30; 50 L. J. P. 42, the invalid will of a married woman was held to be incorporated with a codicil; in *In b. Countess of Durham*, 3 Cur. 57, the revoked will of another person, and in *In b. Hally*, 5 No. Cas. 510, a letter was held to be incorporated with the will in which it was referred to; and for an instance of a revoked will being conditionally revived by incorporation, see *In b. Bangham*, 1 P. D. 429; 45 L. J. P. 80. But a deed referred to as "made" by the testator, but in fact not executed by him, was held not to be incorporated with his will, not being considered to be sufficiently identified, *In b. Edwards*, 6 No. Cas. 306; and alterations unaccounted for in a duly identified and incorporated document were excluded from probate, *Swete* v. *Pidsley*, *ib.* 189. See also *Eyre* v. *Eyre*, [1903] P. 131; 72 L. J. P. 45.

Unidentified alterations.

In *In b. Bacon*, 3 No. Cas. 645, a schedule of books, and in *In b. Ash*, 1 D. & Sw. 181, a list of plate, written on the same sheet as the will, and in *In b. Hunt*, 2 Rob. 622, and in *In b. Stewart*, 4 Sw. & Tr. 211, lists of articles on separate papers, were held to be incorporated.

Insufficient identity.

In the following cases the identity was held to be insufficiently shown, and the instruments intended to be referred to were not made parts of the respective wills, *Collier* v. *Langebeare*, 1 No. Cas. 369; *In b. Astell*, 5 No. Cas. 489, n.; *In b. Baldwin*, *ib.* 293; *In b. Skair*, *ib.* 57; *In b. Hakewell*, D. & Sw. 14; *In b. Sotheron*, 2 Cur. 831; *In b. Countess of Pembroke*, D. & Sw. 182. In several cases the document intended to be incorporated was actually written upon the back of the same piece of paper as the will itself. See *In b. Drummond*, 2 Sw. & Tr. 8; *In b. Brewis*, 3 Sw. & Tr. 473; 33 L. J. P. 124; *In b. Tovey*, 47 L. J. P. 63.

Incorporated documents, probate of.

Strictly, all papers entitled to probate ought to receive probate; but the Court exercises a discretion, *Quihampton* v. *Going*, 24 W. R. 917; and in the case of a will referring to and incorporating a deed in the

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possession of persons (trustees for example) who will not give up the deed, probate will be passed of the will alone, without a deposit of the original deed, *Sheldon* v. *Sheldon*, 1 Rob. 81; *In b. Battersbee*, 2 Rob. 439; *In b. Sibthorp*, L. R. 1 P. & D. 106; 35 L. J. P. 73; a notarial copy, if obtainable, will be deposited in the registry, and a similar copy will form part of the probate, *In b. Dickins*, 3 Cur. 60; but see *In b. Dundas*, 1 N. R. 569; *In b. Marquis of Lansdowne*, 3 Sw. & Tr. 194; 32 L. J. P. 121. In *In b. Balme*, [1897] P. 261; 66 L. J. P. 161, a testator made a bequest to a college of his books as enumerated in his library catalogue, a voluminous document, a copy of which would have entailed considerable expense. Probate was granted without requiring the catalogue to be brought into the registry, the college undertaking to hold the catalogue for the registry, and a note to that effect being made upon the probate. In *In b. Countess of Limerick*, 2 Rob. 313, probate was granted of a will with extracts from a document referred to, but not recited, in the will. Where a second will, appointing separate executors and disposing only of British funds, contained a direction that it should take effect as a separate instrument independent of an American will, it was held unnecessary to incorporate the American will, but an authenticated copy thereof was filed, and a note to that effect was added to the English probate, *In b. Astor*, 1 P. D. 150; 45 L. J. P. 78. And where there are two wills, one dealing with property in England, and the other dealing exclusively with property situate abroad, the Court will decree probate of the English will only, *In b. Tamplin*, [1894] P. 39; 63 L. J. P. 75; *In b. Murray*, [1896] P. 65; 65 L. J. P. 59. See also *In b. Callaway*, 15 P. D. 147; 59 L. J. P. 73.

In *Quihampton* v. *Going*, 24 W. R. 917, entries in the testator's ledger, referred to by the will, were treated by a court of construction as a part of the will, although they were not included in the probate.

(*b*) The provisions of the Act as to the execution of a will cannot be evaded by means of a power created for the purpose, *Johnson* v. *Ball*, 5 De G. & S. 85; 21 L. J. Ch. 210.

Signature at the foot or end of the will.

(*c*) The will shall be signed "*at the foot or end thereof.*" The litigation on this branch of the 9th section has, since the passing of the Act 15 & 16 Vict. c. 24 (*post*, p. 71), almost ceased. The last-mentioned Act being retrospective (except in the circumstances referred to in the 2nd section) as well as prospective, the cases decided between January 1, 1838, and June 17, 1852 (when the amending Act came into operation), on the position of the testator's signature, have not now much practical value, except that as to all wills which the Court had pronounced to be defectively executed the parties interested are, by sect. 2, shut out from the benefits of the amending Act (16 Jur. 602, n.). The cases will be found collected in Sugd. R. P. Stat. c. 7, s. 1, 1st ed.; Deane, Wills, 71.

Testator, signature of.

His knowledge of the contents of the will.

(*d*) The will shall be signed "*by the testator.*" It is essential to the validity of a will that, at the time of signing, the testator should know and approve of its contents, *Hastilow* v. *Stobie*, L. R. 1 P. & D. 64; 35 L. J. P. 18; *Cleare* v. *Cleare*, L. R. 1 P. & D. 655; 38 L. J. P. 81; but proof of the actual reading over of the document to him is not necessary, *Mitchell* v. *Thomas*, 6 Moo. P. C. 137. The *onus* of proof of the genuineness and authenticity of a will lies on the party propounding it, and if the conscience of the judge is not satisfied on these points he is bound to refuse probate, *Baker* v. *Batt*, 2 Moo. P. C. 317; and this burthen is in general discharged by proof of capacity and the fact of

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execution of the will, from which knowledge and approval of its contents by the testator will be presumed, *Barry* v. *Butlin*, 2 Moo. P. C. 480; *Browning* v. *Budd*, 6 Moo. P. C. 430; but that presumption may be rebutted by circumstances (*ib.*). For the rule as to *onus* of proof upon a person propounding a will executed under suspicious circumstances, see *Tyrrell* v. *Painton*, [1894] P. 151.

Blind testator.

In the case of a blind testator it is highly desirable, though not absolutely necessary, that the will should be read over to him, *Longchamp* v. *Fish*, 2 B. & P., N. R. 415; *Edwards* v. *Fincham*, 4 Moo. P. C. 198. The Ecclesiastical Courts were more strict on this head than the Courts of Law, and required that the will of a blind testator should be read over to him in the presence of a witness, although not necessarily in the presence of a subscribing witness, Sugd. R. P. Stat. 335; and by the 71st rule of 1862, the registrars of the Probate Court are forbidden to grant probate of the will of a blind or illiterate person unless satisfied that it was read over to him before execution, or that he then had knowledge of its contents. See also *In b. Axford*, 1 Sw. & Tr. 540.

Aged or deaf and dumb testator.

As to the will of an aged testator, see *Goose* v. *Brown*, 1 Cur. 707; and as to a deaf and dumb testator, see *In b. Owston*, 2 Sw. & Tr. 461; 31 L. J. P. 177; *In b. Geale*, 3 Sw. & Tr. 431; 33 L. J. P. 125.

Time of signing by testator.

The signature of the testator must precede that of both the witnesses in point of time; if the testator signs after the witnesses, or either of them, the execution is invalid, *In b. Olding*, 2 Cur. 865; *In b. Byrd*, 3 Cur. 117; *In b. Hoskins*, 1 N. R. 569; see also *Cooper* v. *Bockett*, 4 Moo. P. C. 419.

Witnesses must see the signature of testator.

The testator's signature upon the will must be seen by the witnesses, *Hudson* v. *Parker*, 1 Rob. 14; *Shaw* v. *Neville*, 1 Jur. (N.S.) 408; or at all events they should see the testator in the act of writing that which the Court presumes to be his signature, *Smith* v. *Smith*, L. R. 1 P. & D. 143; 35 L. J. P. 65; or they must be so placed that they could see the signature made, *In b. Gunstan*, 7 P. D. 102; 51 L. J. P. 36; but the witnesses need not know that the document is of a testamentary character, *Gaze* v. *Gaze*, 3 Cur. 451; *Keigwin* v. *Keigwin*, *ib.* 607; Sugd. R. P. Stat. 339, 340. The witnesses, however, ought to see that there is writing on the paper before the testator's signature is affixed or acknowledged, or other evidence must be produced to show that the paper was not a blank, *In b. Hammond*, 3 Sw. & Tr. 90; 32 L. J. P. 200.

Testator's signature.

By making his mark.

The mark of the testator (whether he can or cannot write) is a sufficient signature, *In b. Field*, 3 Cur. 752; *Baker* v. *Dening*, 8 A. & E. 94; 7 L. J. (N.S.) Q. B. 137; even though his name is not affixed to the mark, *In b. Bryce*, 2 Cur. 325; a facsimile of testator's signature impressed on the will by means of an engraved stamp is sufficient, *Jenkins* v. *Gaisford*, 3 Sw. & Tr. 93; 32 L. J. P. 122; and where a wrong name is added by one of the witnesses to the testator's mark, the execution, if there is no doubt as to the identity, is good, *In b. Clarke*, 1 Sw. & Tr. 22; 27 L. J. P. 18; *In b. Powell*, 6 No. Cas. 557. See also *In b. Douce*, 2 Sw. & Tr. 593; 31 L. J. P. 172, where the person who wrote a will for a marksman, misnamed him in the body of the will, and also wrote a wrong name opposite to the testator's mark. The will was admitted to probate.

Wrong name.

The signature to her will by a married woman in the name of her deceased first husband is good, *In b. Glover*, 5 No. Cas. 553; and the signature in an assumed name is good, *In b. Redding, otherwise Higgins*, 2 Rob. 339; and where the testatrix, after signing in an assumed name,

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erased that name, and inserted her real name without any formal re-execution of her will, the original execution was held good (*ib.*). The

By initials.

signature of a testator by writing his initials is good, *In b. Wingrove*, 15 Jur. 91; *In b. Savory*, *ib.* 1042; *In b. Hinds*, 16 Jur. 1161. The hand of the testator, if he is unable from illness to sign, may be guided, *Wilson* v. *Beddard*, 12 Sim. 28; 10 L. J. (N.S.) Ch. 305. But the ceremony of execution must be complete whilst the testator is living; for where an intended testator tries to sign his will, but fails from weakness, the Court has no power to decree probate, *In b. Wilson*, 2 Cur. 854.

Sealing.

The sealing (without signing) of a will by the testator is not a due execution, *In b. Summers*, 7 No. Cas. 562; *Smith* v. *Evans*, 1 Wils. 313; *Wright* v. *Wakeford*, 17 Ves. at 459; 2 Hayes, Conv. 642. But see Jarm. Wills, 107.

Ex post facto declarations of testator inadmissible.

The declaration by a testator (an Indian officer), in a letter to his brother in England, that he had executed a will of which he inclosed a copy in the letter, was held inadmissible, and probate of the copy was not granted, *In b. Ripley*, 1 Sw. & Tr. 68. See also the note to sect. 21.

Testator, signature of, by an amanuensis.

(*e*) The will shall be signed "*by the testator or by some other person in his presence and by his direction.*" The "other person" here referred to may be one of the witnesses, *In b. Bailey*, 1 Cur. 914; *Smith* v. *Harris*, 1 Rob. 262; and where a witness, *In b. Ullersperger*, 6 Jur. 156, or the other person above referred to, *In b. Clark*, 2 Cur. 329; *In b. Blair*, 6 No. Cas. 528, signed his own name instead of that of the testator, the signature was held good.

Witnesses, presence of, with respect to each other and the testator.

(*f*) The signature shall be made or acknowledged "*in the presence of two or more witnesses present at the same time.*" Both the witnesses must be present together when the will is signed by or by the direction of the testator, or when the signature is acknowledged by him, *In b. Mansfield*, 1 No. Cas. 362; and see *In b. Ayling*, 1 Cur. 913. And the two witnesses must both sign in the presence of the testator, but it has been held not necessary that the witnesses should sign in the presence of each other, *Faulds* v. *Jackson*, 6 No. Cas. Supp. 1; *Chodwick* v. *Palmer*, cited D. & Sw. 2; *In b. Webb*, D. & Sw. 1. This point is, however, not yet free from doubt. See the question discussed in 53 Sol. J. at pp. 212, 482. But it is necessary that both witnesses should be jointly present at the same act of the testator. Therefore, if the order of events is as follows—viz., (1) testator signs will in presence of first witness, (2) first witness attests signature, (3) second witness arrives, and testator in presence of both witnesses acknowledges his signature, (4) second witness attests—the execution will be insufficient because the signature was attested by the first witness only, and the acknowledgment by the second witness only. The second witness was not a witness to the signature, and the first witness was not a witness to the acknowledgment, *Wyatt* v. *Berry*, [1893] P. 5; 62 L. J. P. 28; *Brown* v. *Skirrow*, [1902] P. 3; 71 L. J. P. 19; and see *In b. Allen*, 2 Cur. 331; *In b. Simmonds*, 3 Cur. 79; *Casement* v. *Fulton*, 5 Moo. P. C. 130; Sugd. R. P. Stat. 342; *Moore* v. *King*, 3 Cur. 243.

Testator, presence of with respect to the witnesses on their signing.

The testator must be in such a position that he might, if he had wished, have seen the witnesses as they subscribed, *Casson* v. *Dade*, 1 Br. C. 99. Therefore, during the ceremony of the execution and attestation of a will, the testator should not turn his back upon the witnesses, or be shut out from their view by a curtain, or a screen, or in any other mode, *Tribe* v. *Tribe*, 1 Rob. 775; see, however, Sugd. R. P.

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Stat. 343; and *Newton* v. *Clarke*, 2 Cur. 320, in which case, in circumstances similar to those in *Tribe* v. *Tribe*, the execution was supported. The witnesses should not go into an adjoining room for the greater convenience of affixing their signatures, *In b. Newman*, 1 Cur. 914; *In b. Ellis*, 2 Cur. 395; *In b. Colman*, 3 Cur. 118; *Norton* v. *Bazett*, D. & Sw. 259; *In b. Killick*, 3 Sw. & Tr. 578; 34 L. J. P. 2; *Jenner* v. *Finch*, 5 P. D. 106; 49 L. J. P. 25; *Carter* v. *Seaton*, 85 L. T. 76. And in the case of a blind testator, the witnesses must, when they are in the act of signing their names, be in such a position that the testator, if he were not blind, could see them affixing their signatures, *In b. Piercy*, 1 Rob. 278.

Blind testator.

It will be seen that it is the testator's signature, not his will, that is required to be acknowledged. See *In b. Pattison*, [1918] 2 I. R. 90. Where the will is perfect on the face of it, the presumption is in favour of a due acknowledgment—*omnia præsumuntur rite esse acta*, *Lloyd* v. *Roberts*, 12 Moo. P. C. 158; *Wright* v. *Sanderson*, 9 P. D. 149; 53 L. J. P. 49; *In b. Moore*, [1901] P. 44; 70 L. J. P. 16. Acknowledgment by express words is not necessary. The acknowledgment by the testator that the document produced bears his signature or a signature made by his direction, may be assumed from the attendant circumstances, *Gaze* v. *Gaze*, 3 Cur. 451; *Blake* v. *Knight*, *ib.* 547; *Keigwin* v. *Keigwin*, *ib.* 607; *In b. Ashmore*, *ib.* 756; *In b. Thomson*, 4 No. Cas. 643; *In b. Dinmore*, 2 Rob. 641; *Daintree* v. *Butcher*, 13 P. D. 102; 57 L. J. P. 76. Where a testatrix was extremely ill, her acknowledgment by gesture was held sufficient, *In b. Davies*, 2 Rob. 337; and an acknowledgment may be assumed from the acts of the testator at the time of attestation, *In b. Jenner*, 6 Jur. 564; *In b. Bosanquet*, 2 Rob. 577; *In b. Philpot*, 2 No. Cas. 2; *In b. Jones*, D. & Sw. 3; or from the attendant circumstances, though no act be done or word uttered by the testator, *Faulds* v. *Jackson*, 6 No. Cas. Supp. 1; *Inglesant* v. *Inglesant*, L. R. 3 P. & D. 172; 43 L. J. P. 43. A simple request by a testator that the witnesses would put their names underneath his own is sufficient, *Gaze* v. *Gaze*; *Keigwin* v. *Keigwin*, *ubi sup.* Where two witnesses, one of whom had the will in his hand, came into the testatrix's bedroom, and said, "We have come at your request to witness your will," and the testatrix said, "I am glad of it, thank God!" and the witnesses thereupon signed the will, which had been previously signed by the testatrix, this was held a sufficient acknowledgment, *In b. Warden*, 2 Cur. 334. And acknowledgment will be presumed from the attendant circumstances, whether the signature be made by the testator himself, or by some other person in his presence by his direction, *In b. Regan*, 1 Cur. 909. But acknowledgment will not be presumed from the testator's sealing and delivering the will as his act and deed, the will having been signed by another person on behalf of the testator, *In b. Summers*, 7 No. Cas. 562. And in the cases where acknowledgment is presumed from attendant circumstances, it is necessary that the witnesses, before they sign, should actually see that the document bears the testator's signature, *Ilott* v. *Genge*, 4 Moo. P. C. 271; *Hudson* v. *Parker*, 1 Rob. 14; *Shaw* v. *Neville*, 1 Jur. (N.S.) 408; *Pearson* v. *Pearson*, L. R. 2 P. & D. 451; 40 L. J. P. 53; or, at all events, should have the opportunity of seeing the signature; if such be not the case, it is immaterial whether the signature be there at the time of attestation, or whether the testator say that the paper is his will, or that his signature is inside, *Blake* v. *Blake*, 7 P. D. 102; 51 L. J. P. 36; disapproving *Gwillim* v. *Gwillim*, 3 Sw. & Tr. 200; 29

Presumption in favour of due acknowledgment.

Acknowledgment assumed from circumstances.

Sealing an insufficient acknowledgment.

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L. J. P. 31; and *Beckett* v. *Howe*, L. R. 2 P. & D. 1; 39 L. J. P. 1.

As to evidence of testator's signature.

Positive affirmative evidence by the subscribing witnesses to the fact of the signing or acknowledgment of the will by the testator in their presence is not absolutely essential, and the Court may, in the absence of suspicious circumstances, presume a due execution, *Blake* v. *Knight*, 3 Cur. 547; *Hitch* v. *Wells*, 10 Be. 84; *In b. Huckvale*, L. R. 1 P. & D. 375; 36 L. J. P. 84; and it is favourable to this presumption if the testator had experience in the execution of legal documents, *Plenty* v. *West*, 9 Jur. 458; *Lloyd* v. *Roberts*, 12 Moo. P. C. 158. But where there is no formal attestation clause, and no affirmative evidence that the testator's signature was on the paper when the witnesses signed, the mere production of it to witnesses with a request that they will sign it is insufficient to enable the Court to infer that it was already signed by the deceased, *Fischer* v. *Popham*, L. R. 3 P. & D. 246; 44 L. J. P. 47.

Marksman.

As to acknowledgment by a marksman, see *Morritt* v. *Douglas*, L. R. 3 P. & D. 1; 42 L. J. P. 10.

"Attest" and "subscribe."

(*g*) The witnesses "*shall attest and subscribe the will.*" As to the meaning of "attest," see *Burdett* v. *Spilsbury*, 10 C. & F. 340; *Warren* v. *Postlethwaite*, 2 Coll. 113; 14 L. J. Ch. 422; and of "subscribe," according to the Stat. of Frauds, *Roberts* v. *Phillips*, 4 E. & B. 450; 24 L. J. Q. B. 171; Sugd. Pow. 229, 240. Where the witnesses signed their names in the margin of the paper on which the will was, and opposite to certain alterations, but with the intention of attesting the testator's signature to the will, this was held to be a valid subscription, *In b. Streatley*, [1891] P. 172; 60 L. J. P. 56. See also *Woodhouse* v. *Balfour*, 13 P. D. 2; 57 L. J. P. 22.

"Presence" of witness, what is.

It has been contended that the "presence" of the witnesses required by this section is a presence simply and grossly corporeal (see H. Sugd. Wills, 37; Sugd. R. P. Stat. 340), so that a person of unsound mind might be a witness to a will. It seems, however, to be the better opinion that not only a bodily but a mental presence is required, see 1 Hayes, Conv. 360, 363, 371; Taylor, Evidence, 757; *Hudson* v. *Parker*, 1 Rob. 14. Even if it be conceded that mental consciousness is not included in the idea of "presence," and that it is not necessary to enable the person duly to "subscribe," still the witness is required to do something more—he must "attest" the will; and this would seem to imply, not only general sanity and mental consciousness, but particular consciousness of and attention to the actual ceremonies of execution. In short, the witness must have the intention of attesting the testator's signature, *Griffiths* v. *Griffiths*, L. R. 2 P. & D. 300; 41 L. J. P. 14.

Minor.

A minor may attest a will; unless incompetent from extreme youth to understand and testify (Ste. Evid. ch. 15).

Full attestation clause—and witnesses dead;

If the subscribing witnesses to a will, of which the attestation clause is in the proper form, are both dead, the law presumes the will to have been well executed; the presumption of law is in favour of the due execution of the will, if the witnesses, *Burgoyne* v. *Showler*, 1 Rob. 5, or either of them, *Blake* v. *Knight*, 3 Cur. 547; *Leech* v. *Bates*, 1 Rob. 715; *Shield* v. *Shield*, 4 No. Cas. 647, be living and entirely forgetful of all the facts, *Foot* v. *Stanton*, D. & Sw. 19; *In b. Holgate*, 1 Sw. & Tr. 261; 29 L. J. P. 161; *Gwillim* v. *Gwillim*, 3 Sw. & Tr. 200; 29 L. J. P. 31; *In b. Colyer*, 14 P. D. 48; *Whiting* v. *Turner*, 89 L. T. 71.

or forgetful of the fact.

Imperfect attestation

Where a will has an imperfect attestation clause, and the witnesses cannot be found, *In b. Luffman*, 11 Jur. 211; *In b. Sir J. Dickson*,

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6 No. Cas. 278; or the will contains no attestation clause, but only the signatures of the witnesses, and they are dead, *Trott* v. *Skidmore*, 2 Sw. & Tr. 12; 29 L. J. P. 156; *Harris* v. *Knight*, 15 P. D. 170; or the witnesses do not remember some of the facts, *In b. Leach*, 12 Jur. 381; see also *In b. Thomas*, 1 Sw. & Tr. 255; 28 L. J. P. 33, or differ in their evidence or their recollection fails, *Gregory* v. *Queen's Proctor*, 4 No. Cas. 620; *Vinnicombe* v. *Butler*, 3 Sw. & Tr. 580; 34 L. J. P. 18; the will, if all the attendant circumstances lead to the inference that the signatures of the witnesses are genuine, will be held to be duly executed. See *In b. Peverett*, [1902] P. 205; 71 L. J. P. 114; *In b. Strong*, [1915] P. 211; 84 L. J. P. 188. Where two witnesses to a will executed abroad were out of the jurisdiction, and the third witness dead, the Court of Exchequer decided that proof of the handwriting of the testator and witnesses was sufficient proof of the attestation of the will, *Platel* v. *Stert*, 2 L. T. 210; and when the inaccuracy and imperfect recollection of the witnesses are established, the Court may, upon the circumstances of the case, presume the due execution, *Leech* v. *Bates*, 1 Rob. 715; *Wright* v. *Sanderson*, 9 P. D. 149; 53 L. J. P. 49. So where one witness deposed to the due execution of the will, and the other witness had no recollection of the facts, probate was allowed, *In b. Hare*, 3 Cur. 54. But if the subscribing witnesses negative the fact of compliance with the requisites of the 9th section, probate will be refused, *Beach* v. *Clarke*, 7 No. Cas. 120; *Croft* v. *Croft*, 4 Sw. & Tr. 10; 34 L. J. P. 44; unless the evidence of the witnesses be rebutted by showing either that they cannot be credited or that upon the statement of the facts their memories are defective, *Burgoyne* v. *Showler*, 1 Rob. 5; or that there are circumstances raising a presumption that the witnesses are mistaken, *Noding* v. *Alliston*, 14 Jur. 904; *Lloyd* v. *Roberts*, 12 Moo. P. C. 158. In *Shield* v. *Shield*, 4 No. Cas. 647, the will not being opposed, probate was granted although one of the attesting witnesses had no recollection of the matter and the other attesting witness gave evidence negativing its due execution. Where one witness was dead and the other swore that the paper was blank at the time of execution, the will, being perfect on the face of it, and the testator being a solicitor, was upheld by the Court, although the testator's wife and children (who, however, had for many years lived apart from him) were excluded from all benefit, *Lloyd* v. *Roberts*, *supra*.

clause—and witnesses cannot be found;

or forget the facts.

Witnesses out of the jurisdiction.

Evidence of witnesses inaccurate and imperfect.

Evidence negativing compliance with provisions of s. 9;

—may be rebutted.

The execution of a will may be supported on the evidence of one witness, that of the other having been discredited, *Farmer* v. *Brock*, D. & Sw. 187. And the testimony of one subscribing witness was held sufficient though the other deposed that the testator had not signed in his presence, *Gove* v. *Gawen*, 3 Cur. 151. In that case the attendant circumstances favoured the supposition of a valid execution, there being a formal attestation clause, and the first witness having deposed to the due execution of the will a few days after it was made, while the second was not examined until two years and a half afterwards. See also *Wright* v. *Rogers*, L. R. 1 P. & D. 678; 38 L. J. P. 67. But in *Mackenzie* v. *Yeo*, 3 Cur. 125, the evidence of one witness was held insufficient to support a codicil, the attendant circumstances being suspicious. And where one witness deposed that the will was executed by the testator after the witness had signed, and the other witness deposed that the will was not executed in the presence of the two witnesses, and the attestation clause was imperfect, probate was refused, *Pennant* v. *Kingscote*, 3 Cur. 642. See also *Young* v. *Richards*, 2 Cur.

Evidence of one witness.

Evidence conflicting.

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373; *Chambers* v. *Queen's Proctor, ib.* 433. And where the evidence of the witnesses is not clear, the testimony of a third person who, though not a subscribing witness, was present during the ceremony of execution will be received in support of, or in opposition to, probate, *Bayliss* v. *Sayer*, 3 No. Cas. 22; *Bennett* v. *Sharp*, 1 Jur. (N.S.) 456. See also *In b. Attridge*, 6 No. Cas. 598.

Evidence not clear.

Experience in attesting wills.

If the testator has had experience in the execution of wills, this is a circumstance favouring presumption of due execution, *Lloyd* v. *Roberts*, 12 Moo. P. C. 158; *Brenchley* v. *Still*, 2 Rob. 162; *Blake* v. *Knight*, 3 Cur. 547. But see *post*, p. 101. The evidence of illiterate witnesses to a will, as to the details of the ceremony, is received with caution, *Cooper* v. *Bockett*, 4 Moo. P. C. 419; but if the attendant circumstances are free from suspicion, a will will not be set aside though the testimony of the witnesses is confused or indefinite, or even that of one of the witnesses adverse, *Bayliss* v. *Sayer*, 3 No. Cas. 22; *Brenchley* v. *Still*, 2 Rob. 162; *Gove* v. *Gawen*, 3 Cur. 151; *Keating* v. *Brooks*, 4 No. Cas. 253; *In b. Mustow*, 4 No. Cas. 289; *Wright* v. *Sanderson*, 9 P. D. 149; 53 L. J. P. 49.

Illiterate witnesses.

Evidence confused and indefinite.

(*h*) The witnesses "*shall attest and shall subscribe the will in the presence of the testator.*" Where a will was prepared in duplicate, one copy signed by the testator and the other by the witnesses, neither copy separately, nor the two together, could be admitted to probate, *In b. Hatton*, 6 P. D. 204; 50 L. J. P. 78.

Will contained in several loose sheets.

When several sheets of paper, constituting a connected (though not in all points a consistent) disposal of property, are found together, the last sheet being duly executed, the presumption in the absence of direct proof is that they all formed the will of the deceased at the time of execution, *Marsh* v. *Marsh*, 1 Sw. & Tr. 528; 30 L. J. P. 77. As to the dangers which may arise from a will being contained in several sheets of paper, see *Leonard* v. *Leonard*, [1902] P. 243; 71 L. J. P. 117.

Witnesses.

Mark, good.

In the attesting of a will, the mark of a witness is sufficient, *In b. Ashmore*, 3 Cur. 756; and this is true, even if the witness can write, *In b. Amiss*, 2 Rob. 116; and although a wrong surname was affixed by the testator to the mark of a witness, his attestation was held good, *In b. Ashmore, ubi sup.* Where a witness, intending to write his own name, writes a wrong one by mistake, or writes words sufficient and intended to identify himself as the person attesting, the attestation is good, *In b. Olliver*, 2 Ecc. and Ad. Rep. 57; *In b. Sperling*, 3 Sw. & Tr. 272; 33 L. J. P. 25; but where, by desire of the testator, a woman signed her husband's name not intending thereby to represent her own signature, the attestation was held bad, *Pryor* v. *Pryor*, 29 L. J. P. 114; and see *In b. Cope*, 2 Rob. 335; *In b. White*, 2 No. Cas. 461; *In b. Leverington*, 11 P. D. 80; 55 L. J. P. 62. The signature of a witness by his initials is a good attestation, *In b. Christian*, 2 Rob. 110; *In b. Hinds*, 16 Jur. 1161; *In b. Blewitt*, 5 P. D. 116; 49 L. J. P. 31; *Margary* v. *Robinson*, 12 P. D. 8; 56 L. J. P. 42; but his seal is not, *In b. Byrd*, 3 Cur. 117. The hand of a witness who cannot write may be guided, *Harrison* v. *Elvin*, 3 Q. B. 117; 61 R. R. 153; *In b. Frith*, 1 Sw. & Tr. 8; 27 L. J. P. 6; *Lewis* v. *Lewis*, 2 Sw. & Tr. 153. If a witness cannot write and his name be written for him, he making no mark to be afterwards recognised upon the will, the attestation is bad, *In b. Mead*, 1 No. Cas. 456; *In b. Cope*, 2 Rob. 335. The same is true where the witnesses are husband and wife, and the husband signs for the

Wrong name.

Initials, good.

Seal, bad.

Witness's hand may be guided.

Name written for him, he making no mark.

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wife, *In b. White*, 2 No. Cas. 461; and one witness cannot subscribe for the other, *ib.*

A paper is not entitled to probate unless the Court is satisfied that the names of the alleged witnesses were subscribed for the purpose of attesting the testator's signature; a subscription *alio intuitu* will not suffice, *In b. Wilson*, L. R. 1 P. & D. 269; 36 L. J. P. 1; *Griffiths* v. *Griffiths*, L. R. 2 P. & D. 300; 41 L. J. P. 14.

If the witnesses are dead, it will not be presumed that they did not both sign at the same time from a difference in the colour of the ink, *Trott* v. *Skidmore*, 2 Sw. & Tr. 12; 29 L. J. P. 156.

Witness's acknowledgment of prior signature, bad.

The acknowledgment of a prior signature, though good if made by a testator, is bad in the case of a witness; thus the acknowledgment by a witness of his signature made on the occasion of a previous informal execution of the will, and the signature at the same time in his presence by a second witness form together an insufficient attestation, *Moore* v. *King*, 3 Cur. 243, and cases referred to *ante*, p. 18. And if, on the re-execution of a will, a witness with a dry pen traces over his previous signature, this, though good as an acknowledgment in the case of a testator, *Lewis* v. *Lewis*, [1908] P. 1; 77 L. J. P. 7, is, as to a witness, bad, *Playne* v. *Scriven*, 1 Rob. 772; *In b. Trevanion*, 2 Rob. 311; *In b. Simmonds*, 3 Cur. 79; *In b. Cunningham*, 4 Sw. & Tr. 194; 29 L. J. P. 71; the Act requiring something to be done by the witness which shall be apparent on the face of the will. The addition on the re-execution of a will of the word "Bristol," the place of residence of one of the witnesses who was a witness to both executions, was not a good attestation of the second execution, *In b. Trevanion, ubi sup.* To make a valid subscription and attestation, there must be either the name of the witness or some mark intended to represent it; the correction of an error in a previous writing of the name, or the addition of a date to it, is not sufficient: thus where, in circumstances similar to those in *In b. Trevanion*, a witness, one of whose christian names was "Frederick," put a cross to the letter "F" of his first signature, the second attestation was held bad, *Hindmarsh* v. *Charlton*, 8 H. L. C. 160. See also *In b. Eynon*, L. R. 3 P. & D. 92; 42 L. J. P. 52; *In b. Maddock*, L. R. 3 P. & D. 169; 43 L. J. P. 29; *In b. Leverington*, 11 P. D. 80; 55 L. J. P. 62. In *In b. Maddock, ubi sup.*, a witness wrote his christian name, but was unable, through feebleness, to sign his surname, and the attestation was held insufficient on the ground that the witness did not intend the mere christian name to be a complete signature. A valid execution is not destroyed by subsequent mistakes, *In b. Savory*, 15 Jur. 1042, as by alterations or erasures made in error, *In b. Hannam*, 7 No. Cas. 437; *In b. Redding*, 14 Jur. 1052, or by the cutting off of one of the witnesses' names for the purpose of its being re-written, *In b. Tozer*, 7 Jur. 134. See also *In b. Coleman*, 2 Sw. & Tr. 314; 30 L. J. P. 170.

Tracing over previous signature, bad.

There must be the name of witness or a mark intended to represent it.

Evidence of the execution of a will.

The execution of a will may be proved on the evidence of one only of the attesting witnesses. By the practice of the Prerogative Court, the evidence of both the witnesses to a will was necessary. But the question as to evidence is now governed by 20 & 21 Vict. c. 77, s. 33, which enacts that the rules of evidence observed in the common law courts are to be observed in the Court of Probate, *Belbin* v. *Skeats*, 1 Sw. & Tr. 148; 27 L. J. P. 56. With respect to wills relating to real estate, however, it is the invariable practice of equity courts to require the examination of all the witnesses who can be called; and this practice now obtains in all courts, 2 Taylor on Evidence, 1270.

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Attestation, form of.

(*i*) "*No form of attestation shall be necessary.*" This applies to wills in execution of powers (Sugd. Pow. 243), as well as to other testamentary instruments. The mere subscription of the witnesses, without a word in addition to their names, is sufficient, *Bryan* v. *White*, 2 Rob. 315; *In b. Thomas*, 1 Sw. & Tr. 255; 28 L. J. P. 33. See Sugd. R. P. Stat. 333; 2 Hayes, Conv. 642.

A full attestation clause, though not absolutely necessary, is useful and desirable for the purposes of probate, inasmuch as the presumption of due execution is much stronger where there is a full and due attestation clause than where there is not, as abundantly appears from the authorities already referred to. If the formalities of execution are not stated to have been complied with, they must be proved, if proof can be obtained, and if not, the absence of proof accounted for, *In b. Diaper*, 3 N. R. 215. The presumption of due execution arising from a formal attestation clause may of course be negatived by evidence of the actual circumstances of the execution, *Croft* v. *Croft*, 4 Sw. & Tr. 10; 34 L. J. P. 44. If another person than the testator signs for him, that fact should, to save trouble in obtaining probate, be mentioned in the attestation. The position of the attestation clause, should there be one, appears to be unimportant, *In b. Davis*, 3 Cur. 748; *In b. Chamney*, 1 Rob. 757; in the latter case, an attestation clause on the fourth side of a sheet of paper folded bookwise, the whole will and the testator's signature being on the first side, was held good. See also *Roberts* v. *Phillips*, 4 E. & B. 450; 24 L. J. Q. B. 171; *In b. Braddock*, 1 P. D. 433; 45 L. J. P. 96; *In b. Streatley*, [1891] P. 172; 60 L. J. P. 56; *Lewis* v. *Lewis*, [1908] P. 1; 77 L. J. P. 7. But, in *In b. Taylor*, 2 Rob. 411, where there were two testamentary dispositions on the same sheet of paper, signed by the testatrix at the same time, and the witnesses subscribed their names only to the first in order, it was held that they attested the first only, and probate of the second was refused. If a will is on several sheets, all of which are signed by the testator and witnesses except the last, which is signed by the testator only, the execution is bad, *Ewen* v. *Franklin*, D. & Sw. 7; *Phipps* v. *Hale*, L. R. 3 P. & D. 166; *a fortiori*, where the last sheet is signed by the witnesses only, *Sweetland* v. *Sweetland*, 4 Sw. & Tr. 6; 34 L. J. P. 42.

In *In b. Braddock, ubi sup.*, the witnesses to the execution of a codicil signed their names on the back of a will to which the codicil was attached by a pin. The Court decreed probate of the codicil, being satisfied that the witnesses intended by their subscription on the back of the will to attest the signature of the testatrix at the foot of the codicil.

EXECUTION OF TESTAMENTARY APPOINTMENTS.

Sect. 10.

Appointments by will to be executed like other wills, &c.

X. And be it further enacted, That no appointment (*a*) made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been (*b*) expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

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Appointment by writing under hand and seal.

(*a*) A power to appoint by writing under the hand and seal of the donee is not well exercised by the will of the donee executed and attested according to the provisions of the 9th section, but unsealed, *West* v. *Ray*, Kay, 385; *Taylor* v. *Meads*, 4 D. J. & S. 597; 34 L. J. Ch. 208. See Sugd. Pow. 217; 4 Dav. Conv. 31.

Will under seal; effect of, in exercising a power.

That a will is a "writing," within the meaning of a power to appoint "by writing," see *Taylor* v. *Meads*, *ubi sup.* Consequently a power to appoint "by writing under hand and seal" is well exercised by a will duly signed, attested, and sealed, *Smith* v. *Adkins*, L. R. 14 Eq. 402; 41 L. J. Ch. 628; *Re Greave's Settlement Trusts*, 23 Ch. D. 313; 52 L. J. Ch. 753; and it is submitted that a power to appoint "by will under hand and seal," or "by writing, testamentary or otherwise, under hand and seal," would fall within this section of the Wills Act, and be well exercised by a will duly signed and attested, without the addition of a seal.

The Act is confined to the requisites of execution and attestation.

But the Act is confined to the mode of execution and attestation; and in regard therefore to all other matters, though relating to the quality or perfection of the instrument, as enrolment, registration, engrossment on parchment, indentation, or any similar requisite, however whimsical, *Hawkins* v. *Kemp*, 3 East, 410, it would seem that the terms of the power must be pursued as before; and of course this remark applies *a fortiori* to matter relating to the time or the place of execution, 1 Hayes, Conv. 367.

A power to appoint by writing under hand or by will is not well exercised by a document of a testamentary character signed by the donee, but unattested, *Re Daly's Settlement*, 25 Be. 456; 27 L. J. Ch. 751. And see *Re Barnett*, [1908] 1 Ch. 402; 77 L. J. Ch. 267.

Unattested writing, bad.

A power to appoint by will "signed and published in the presence of and attested by three or more witnesses" was held to be well executed by will made and published and signed in the presence of and attested by three witnesses, although the attestation took no notice of the publication, *Re Wrey's Trusts*, 17 Sim. 201.

As to wills in exercise of powers where Lord Kingsdown's Act (24 & 25 Vict. c. 114) applies, see Appendix on Domicile, *post*, p. 416.

22 & 23 Vict, c. 35, s. 12.

The 12th section of 22 & 23 Vict. c. 35 (as to the mode of execution of powers), does not apply to powers to be executed by will.

(*b*) This section relates to powers created since, as well as to powers created before, the Act, *Hubbard* v. *Lees*, L. R. 1 Ex. 255; 35 L. J. Ex. 169.

WILLS OF SOLDIERS AND SEAMEN.

Sect. 11.

Soldiers' and mariners' wills excepted.

XI. Provided always and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea may dispose of his personal estate as he might have done before the making of this Act (*a*).

(*a*) This section has now been explained by the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58), set out below, and the powers of disposition have been thereby extended to realty. Except in the cases coming under the Navy and Marines (Wills) Act, 1865, as to which see note to sect. 12, *post*, any soldier or sailor coming within sect. 11 could, even before the Act of 1918, dispose of his personalty by written or nuncupative will as before the Statute of Frauds (29 Car. 2, c. 3, s. 23), but he must have attained the age of fourteen years, for apart

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from the Wills Act, the age of testamentary capacity is fourteen for a boy and twelve for a girl, Shep. Touch. ch. 23, p. 403; Swinburne on Testaments (7th ed.), p. 114. For "a great abundance of irreconcileable opinions" upon the age at which, apart from the Wills Act, a will of personal estate could be made, see Hargreave's note (6) to Co. Litt. 89 b. In *Re Wernher*, [1918] 1 Ch. 339, Younger, J., expressed an opinion that this section is a proviso upon the sections which follow the last preceding proviso, sect. 8—*i.e.*, sects. 9 and 10, and was inserted only in order to relieve soldiers and sailors from observance of the forms and solemnities required by sects. 9 and 10 This question has now, however, been settled by the Act of 1918, which enables soldiers and sailors and (see sect. 5 (2)) members of the Air Force to make wills of realty and personalty notwithstanding infancy, subject, however, to the provision contained in sect. 51 (3) of the Administration of Estates Act, 1925, noted below, in the case of infants dying after 1925. The Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58), is as follows:—

7 & 8 Geo. 5, c. 58.

An Act to amend the Law with respect to Testamentary Dispositions by Soldiers and Sailors. [6th February, 1918.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Explanation of sect. 11 of 7 Will. 4 and 1 Vict. c. 26.

1. In order to remove doubts as to the construction of the Wills Act, 1837, it is hereby declared and enacted that section eleven of that Act authorises and always has authorised any soldier being in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act, though under the age of twenty-one years.

Extension of sect. 11 of Wills Act, 1837.

2. Section eleven of the Wills Act, 1837, shall extend to any member of His Majesty's naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section.

Validity of testamentary dispositions of real property made by soldiers and sailors.

3.—(1) A testamentary disposition of any real estate in England or Ireland made by a person to whom section eleven of the Wills Act, 1837, applies, and who dies after the passing of this Act, shall, notwithstanding that the person making the disposition was at the time of making it under twenty-one years of age or that the disposition has not been made in such manner or form as was at the passing of this Act required by law, be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such a person domiciled in England or Ireland it would have been valid.

(2) A testamentary disposition of any heritable property in Scotland made after the passing of this Act by a person to whom section eleven of the Wills Act, 1837, applies or to whom it would apply if he were domiciled in England, shall not be invalid by reason only of the fact that such person is under twenty-one years

of age, provided always that he is of such age that he could, if domiciled in Scotland, have made a valid testamentary disposition of moveable property.

Power to appoint testamentary guardians.

4. Where any person dies after the passing of this Act having made a will which is, or which, if it had been a disposition of property, would have been rendered valid by section eleven of the Wills Act, 1837, any appointment contained in that will of any person or guardian of the infant children of the testator shall be of full force and effect.

Short title and interpretation.

5.—(1) This Act may be cited as the Wills (Soldiers and Sailors) Act, 1918.

(2) For the purposes of section eleven of the Wills Act, 1837, and this Act the expression "soldier" includes a member of the Air Force, and references in this Act to the said section eleven include a reference to that section as explained and extended by this Act.

The age of testamentary capacity, as shown above, must of course have been attained to enable a will to be made under sect. 11 of the Wills Act.

It is provided by sect. 51 (3) of the Administration of Estates Act, 1925: "(3) Where an infant dies after the commencement of this Act without having been married, and independently of this subsection he would, at his death, have been equitably entitled under a settlement (including a will) to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, and the settlement shall be construed accordingly."

The Administration of Estates Act, 1925, extends (sect. 58 (3)) to England and Wales only, but an infant who dies after 1925, without having been married, will have no power, as regards England and Wales, to dispose of such an estate or interest acquired under a settlement or will, but his interest will be divested in favour of the settlor or testator from whom it was acquired. The fact that the infant's interest is deemed to be an entailed interest, will not enable the infant to exercise the new statutory power conferred upon a tenant in tail in possession under sect. 176 of the Law of Property Act, 1925, as that power is conferred only upon a tenant in tail "of full age."

Soldier.

That the term soldier extends to non-combatants, and is not limited to soldiers of the King, see *In b. Donaldson*, 2 Cur. 386. In *In b. Stanley*, [1916] P. 192; 85 L. J. P. 222, it was held that an unattested letter of a female nurse employed by the War Office on hospital ships was privileged as a soldier's will within the meaning of sect. 11. And see *In b. Hale*, [1915] 2 I. R. 362, where a lady typist on the S.S. *Lusitania* was held to be a "mariner or seaman."

Actual military service.

The meaning of "actual military service" was discussed in *In b. Hiscock*, [1901] P. 78; 70 L. J. P. 22; *Gattward* v. *Knee*, and *May* v. *May*, [1902] P. 99, 103; 71 L. J. P. 34; *In b. Gordon*, 21 T. L. R. 653; *Re Limond*, [1915] 2 Ch. 240; 84 L. J. Ch. 833; *In b. Grey*, [1922] P. 140; 91 L. J. P. 111. For the older cases, see *Drummond* v. *Parish*, 3 Cur. 522; *White* v. *Repton*, 3 Cur. 818; *In b. Hill*, 1 Rob. 276; *In b. Norris*, 3 No. Cas. 197; *In b. Thorne*, 4 Sw. & Tr. 36; 34 L. J. P. 131; *In b. Phipps*, 2 Cur. 368; *Herbert* v. *Herbert*, D. & Sw. 12; *In b. Churchill*, 4 No. Cas. 47.

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Mariner or seaman.

Sailor.

As regards the meaning of a "mariner or seaman being at sea," the following cases were decided under the Wills Act. The purser of a man-of-war is a "seaman" within this section, *In b. Hayes*, 2 Cur. 338; so is a surgeon in the navy, *In b. Saunders*, L. R. 1 P. & D. 16; 35 L. J. P. 26. The whole service would seem to be included, 1 Wms. Exors. 92.

Sailor at sea.

The informal will of an admiral, made on board a King's ship in a river, whilst engaged on an expedition against an enemy, *In b. Austen*, 2 Rob. 611; the informal will of a seaman in his Majesty's service, who went on shore whilst his vessel was in harbour at Buenos Ayres and there died by an accident, *In b. Lay*, 2 Cur. 375; the informal will of a surgeon in the navy, made on board ship when he was not on duty, but returning from service, *In b. Saunders*, L. R. 1 P. & D. 16; 35 L. J. P. 26; the will of the mate of a man-of-war permanently stationed in Portsmouth harbour, made whilst serving on board, *In b. M'Murdo*, L. R. 1 P. & D. 540; 37 L. J. P. 14; and the testamentary dispositions of a sailor written on a ship lying in a river, and before the ship has actually sailed, *In b. Patterson*, 79 L. T. 123, have been admitted to probate as wills of "seamen at sea." But see *In b. Anderson*, [1916] P. 49; 85 L. J. P. 21.

But the will of the admiral of the Jamaica naval station was declared not within the saving of the Statute of Frauds, 29 Car. 2, c. 3, s. 23; *Earl of Euston* v. *Seymour*, cited 2 Cur. 339; 3 Cur. 530; the will having been made in the admiral's house on shore and not "at sea."

Merchant seaman.

An unattested letter written by a seaman in the merchant service from his vessel lying in Margate Roads, containing a disposition of his property, was admitted to probate, *In b. Milligan*, 2 Rob. 108; so was a letter written by the master of a vessel from a port at which he had touched in his voyage, *In b. Parker*, 2 Sw. & Tr. 375; 28 L. J. P. 91; so were entries in pencil of a testamentary character made in the course of a voyage to Valparaiso by a merchant seaman in an "abstract book" or log book, *In b. Thompson*, 5 No. Cas. 596.

But the letters of a seaman written in port on the day he was shipped, the vessel not sailing until fifteen days after, were not admitted to probate, *In b. Corby*, 18 Jur. 634. And a mariner's will commencing "if I die at sea or abroad," which did not happen, was held to be conditional and was pronounced against, *Lindsay* v. *Lindsay*, L. R. 2 P. & D. 459; 42 L. J. P. 32.

See also under sect. 11 of the Wills Act, *Re Thomas' Estate*, 34 T. L. R. 626.

Naval and marine forces.

Under sect. 2 of the Act of 1918, the capacity of members of His Majesty's naval or marine forces is not now restricted to their being "at sea," but such testators have capacity under sect. 11 of the Wills Act if so circumstanced that they would, if soldiers, be in "actual military service."

Informal wills.

Wills under sect. 11 may be informal, *In b. Farquhar*, 4 No. Cas. 651; *In b. M'Murdo*, L. R. 1 P. & D. 540; 37 L. J. P. 14; *Gattward* v. *Knee*, [1902] P. 99; 71 L. J. P. 34; and may be nuncupative, *In b. Scott*, [1903] P. 243; 73 L. J. P. 17; *Re Stable*, [1919] P. 7. Sect. 15 of the Wills Act does not apply to such wills, so that a gift to an attesting witness is valid, *Re Limond*, [1915] 2 Ch. 240; 84 L. J. Ch. 833.

Power of appointment.

After the passing of the Wills (Soldiers and Sailors) Act, 1918, the case *Re Wernher* above mentioned came before the Court of Appeal upon the question of an infant soldier's capacity to exercise a general power of appointment, and it was held, affirming Younger, J., that sects. 11

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and 27 enabled an infant soldier in actual military service to exercise the power, *Re Wernher*, [1918] 2 Ch. 82; 87 L. J. Ch. 372.

Appointment of guardians.

It was decided in *In b. Tollemache*, [1917] P. 246; 86 L. J. P. 154, that a guardian of infant children could not be appointed by a will made under sect. 11 of the Wills Act, but sect. 4 of the Wills (Soldiers and Sailors) Act, 1918, now enables testamentary guardians to be so appointed.

Revocation.

The will of a soldier made during actual military service, and not expressly revoked, remains operative, though the testator lives in England several years after the date of the will, *Re Leese*, 17 Jur. 216; a testamentary privilege apparently more extensive than that allowed under the Roman law, Inst. ii. Tit. xi.; see also Code Civil, § 984.

It would seem that if an infant soldier on actual military service makes a will and afterwards, as by demobilisation, ceases to be on actual military service while the will is unrevoked, he cannot, until he attains the age of twenty-one, revoke the will except by marriage, see *Re Wernher*, [1918] 1 Ch. 339, at p. 357; and as to revocation of a soldier's will by marriage, see *In b. Wardrop*, [1917] P. 54; 86 L. J. P. 37; and notes to sect. 18, *post*. But it has been held that sect. 20 of the Wills Act does not apply to soldiers' wills, *In b. Gossage*, [1921] P. 194; 90 L. J. P. 201.

Probate.

To obtain probate under sect. 11 the motion must be supported by a statement of the facts, to enable the Court to judge whether or not the will is entitled to the privilege or comes within the scope of the section.

To obtain probate of the unattested will of a soldier, there must be the affidavits of two disinterested persons to prove the handwriting of the deceased, *In b. Neville*, 4 Sw. & Tr. 218; 28 L. J. P. 52; and in the case of an illiterate soldier's will, there must be proof that the will was read over to the deceased, or that he had full knowledge of its contents, *In b. Hackett*, 4 Sw. & Tr. 220; 28 L. J. P. 42. But see *In b. Prendergast*, 5 No. Cas. 92. And as to a nuncupative will, see *Re Stable*, [1919] P. 7; 88 L. J. P. 32.

Alterations.

Where an unattested holograph will of a soldier, in actual service at the date of the will, contained alterations about the making of which no information was obtainable, the alterations were presumed to have been made during the continuance of the military service, and were included in the probate, *In b. Tweedale*, L R. 3 P. & D. 204; 44 L. J. P. 35.

PETTY OFFICERS, SEAMEN AND MARINES.

Sect. 12.

XII. [Repealed by 28 & 29 Vict. c. 112] (*a*).

(*a*) Better provision respecting wills of seamen and marines of the Royal Navy and Marines has been made by The Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72) which statute, as amended by 60 Vict. c. 15, is as follows:—

28 & 29 VICT. c. 72.*

An Act to make better Provision respecting Wills of Seamen and Marines of the Royal Navy and Marines. [29th June, 1865.]

[Be it enacted by the Queen's most excellent Majesty, by and with

* Amended by 60 Vict. c. 15, with respect to persons dying after June, 3, 1897.

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the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:]*

Short title.

1. This Act may be cited as the Navy and Marines (Wills) Act, 1865.

Interpretation of terms.

2. In this Act—

[The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral.]*

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force, exclusive of commissioned warrant, and subordinate officers, and assistant engineers, and of kroomen.

Will made before entry ineffectual as to wages, &c.

3. A will made after the commencement of this Act by any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty.

Will invalid if combined with power of attorney.

4. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney.

Regulations for wills of seamen, &c., as to wages, &c.

5. A will made after the commencement of this Act by any person while serving as a seaman or marine, [*or when he has ceased so to serve,*†] shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions:—

(1.) Every such will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or marines or seamen at sea:

(2.) Where the will is made on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to her Majesty's naval or marine or military force:

(3.) Where the will is made elsewhere than on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister

* Repealed by the Statute Law Revision Act, 1893 (56 Vict. c. 14).

† Repealed with respect to persons dying after June 3, 1897, by the Navy and Marines (Wills) Act, 1897 (60 Vict. c. 15).

of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public [or a solicitor, or in Scotland a law agent*]:

A will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England; and the person taking out representation to the testator under such will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects.

As to wills made by prisoners of war.

6. Notwithstanding anything in this or any other Act, a will made after the commencement of this Act by a seaman or marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions:

(1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to her Majesty's naval or marine or military force, or a warrant or subordinate officer of her Majesty's navy, or the agent of a naval hospital, or a notary public:

(2.) If the will is made according to the forms required by the law of the place where it is made:

(3.) If the will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea.

Payment under will, not in conformity with Act.

7. Notwithstanding anything in this Act, in case of a will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such will, though not made in conformity with the provisions of this Act, if having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with. [*The powers under this section were further extended by the* Navy and Marines (Wills) Act, 1914 (5 Geo. 5, c. 17).]

8. (*Commencement of Act*).†

9. (*Publication of Orders in Council*).†

See also the Merchant Shipping Act, 1894, s. 177 (57 & 58 Vict. c. 60), as to the formalities which the Board of Trade may require before dealing with property in their hands under a seaman's will.

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* These words to be added with respect to persons dying after June 3, 1897. Navy and Marines (Wills) Act, 1897 (60 Vict. c. 15).

† Repealed by the Statute Law Revision Act, 1893 (56 Vict. c. 14).

PUBLICATION.

Sect. 13.

Publication not to be requisite.

XIII. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof (*a*).

Publication.

(*a*) It is not necessary for the testator to inform the witnesses of the testamentary nature of the document which they are about to sign; and if he deceives the witnesses on this point, and leads them to believe that such document is a deed, the execution will be good, Sugd. R. P. Stat. 339, 340; H. Sugd. Wills, 140; 1 Hayes, Conv. 365. See also, *ante*, p. 17.

ATTESTING WITNESSES' COMPETENCY.

Sect. 14.

Will not void by incompetency of witness.

XIV. And be it further enacted, That if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

GIFTS TO ATTESTING WITNESSES.

Sect. 15.

Gifts to an attesting witness to be void.

XV. And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial (*a*) devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will (*b*).

As to witnesses.

(*a*) This section altered the law with respect to the admissibility of witnesses in two ways: first, by destroying the distinction between real and personal estate; for, as a will of personalty did not require any witness, a gift to an attesting witness of such a will was not void under 25 Geo. 2, c. 6, *Emanuel* v. *Constable*, 3 Rus. 436; 5 L. J. Ch. 191; and secondly, by extending the provisions of 25 Geo. 2, c. 6, to the wives and husbands of attesting witnesses.

Gifts to witnesses.

Where a will was attested by two marksmen, and signed also by two other persons as witnesses, a gift to the wife of one of the signing witnesses failed, *Wigan* v. *Rowland*, 11 Ha. 157; 33 L. J. (N.S.) Ch. 69. A will was written on three sheets of paper; the testator W. R. and two persons, J. T. G. and J. S. H., signed the first and second sheets; at the bottom of the third sheet was written, "Witness my hand

Sect. 15.

and seal, W. R. (Seal). Witness J. T. G., J. S. H." ; on the other side was the following memorandum, " This will and testament was signed in our presence, and in the presence of each other by him. Witness thereto, J. T. G., J. S. H., G. B." G. B. signed the memorandum at the request of the testator's wife, who was present, notwithstanding an objection by the testator that such signature was unnecessary ; it was held that G. B. had not attested the will so as to preclude her from taking any interest under the will, *Randfield* v. *Randfield*, 8 H. L. C. 228, n. ; 30 L. J. Ch. 177 ; and see *In b. Sharman*, L. R. 1 P. & D. 661 ; 38 L. J. P. 47. See also *Re Toker*, 4 L. T. 183 ; *Re Harlin*, *ib.* 839 ; *Fell* v. *Biddolph*, L. R. 10 C. P. 701 ; 44 L. J. C. P. 402 ; *In b. Mitchell*, 2 Cur. 916 ; *In b. Forest*, 2 Sw. & Tr. 334 ; 31 L. J. P. 200 ; *Burton* v. *Newbery*, 1 Ch. D. 234 ; 45 L. J. Ch. 202 ; and see sect. 17. Where a solicitor who is an attesting witness is by the will appointed a trustee and authorised to charge profit-costs in respect of any work in relation to the estate, which he could not have done except for the authority to do so contained in the will, this authority confers a bounty, and as he is an attesting witness, he will be precluded by this section from taking advantage of it, *Re Pooley*, 40 Ch. D. 1 ; 58 L. J. Ch. 1. A legacy, annuity, or residue bequeathed by will to A. is not affected by the attestation by A. of a codicil to the will ; and this is true, even though the codicil, by revoking legacies given by the will, indirectly increases the amount of the residue, *Gurney* v. *Gurney*, 3 Drew. 208 ; 24 L. J. Ch. 656 ; *Tempest* v. *Tempest*, 2 K. & J. 635 ; 26 L. J. Ch. 501 ; *Re Marcus*, 57 L. T. 399 ; but see *Gaskin* v. *Rogers*, L. R. 2 Eq. 284. The subsequent marriage of a witness to a person entitled to the benefit of a devise does not render that devise null, *Thorpe* v. *Bestwick*, 6 Q. B. D. 311 ; 50 L. J. Q. B. 320. Where a legatee under a will attests it, and the testator afterwards confirms his will by a codicil duly executed and attested by other witnesses, this will have the effect of entitling the legatee to receive his legacy, *Anderson* v. *Anderson*, L. R. 13 Eq. 381 ; 41 L. J. Ch. 247. Also a person to whom a gift is made by a will to which he is an attesting witness, and whose title to the gift is revived by a codicil which refers to the will but to which he is not an attesting witness, does not lose the benefit so conferred upon him by his attesting a subsequent codicil referring to and confirming the will and the preceding codicil, *Re Trotter*, [1899] 1 Ch. 764 ; 68 L. J. Ch. 363.

As to attesting a codicil.

Subsequent marriage of witness to devisee.

Subsequent codicil.

In *Jull* v. *Jacobs*, 3 Ch. D. 703, the tenant for life under the will was an attesting witness ; the remainders were accelerated, and took effect immediately upon the testator's death ; but in that case the persons entitled in remainder were in existence, and their interests had been postponed only in order that the attesting witness might have the life estate. In *Re Townsend's Estate*, 34 Ch. D. 357 ; 56 L. J. Ch. 227, the remainders after the void life estate were only contingent on the tenant for life dying without leaving issue living at his death. At the decease of the testator, the tenant for life had yet no children. The contingent remainders were not accelerated ; and the income was held to be undisposed of till the birth of a child of the tenant for life, when the principle of *Jull* v. *Jacobs* would apply. The matter was similarly decided in *Kearney* v. *Kearney*, [1911] Ir. R. 137. See also *Re Clark*, 31 Ch. D. 72 ; 55 L. J. Ch. 89, where the remainders were accelerated ; and compare *Aplin* v. *Stone*, [1904] 1 Ch. 543 ; 73 L. J. Ch. 456, where there was an absolute gift to the wife of an attesting witness, with an alternative contingent gift to her children in the event of her being dead at the period of distribution.

Life tenant attesting witness, effect on remainders.

Sect. 15.

Gift to joint tenants, or a class.

Where there is a gift to several as joint tenants, one of whom is an attesting witness and thereby forfeits his interest, the statute does not creates a severance of the joint tenancy, but the whole gift goes to the others, *Young* v. *Davies*, 2 Dr. & S. 167; 32 L. J. Ch. 372; *Re Fleetwood*, 15 Ch. D. 594; 49 L. J. Ch. 514; so, also, where the gift is to a class *Fell* v. *Biddolph*, L. R. 10 C. P. 701; 44 L. J. C. P. 402.

As to a gift to a trustee upon parol trust in favour of an attesting witness, see *Re Fleetwood*, 15 Ch. D. 594; 49 L. J. Ch. 514; but see also *O'Brien* v. *Condon*, [1905] Ir. R. 51.

Devise of property in trust.

A devise or bequest to a witness, to be null and void, must be beneficial, so that in the case of a gift of property upon trust, the gift is not void, *In b. Ryder*, 2 No. Cas. 462; *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69; 37 L. J. Ch. 521. See also *In b. Mitchell*, 2 Cur. 916; *In b. Forest*, 2 Sw. & Tr. 334; 31 L. J. P. 200; *Burton* v. *Newbery*, 1 Ch. D. 234; 45 L. J. Ch. 202; and see sect. 17.

Will of soldier or seaman.

Sect. 15 does not apply to the will of a soldier or seaman made under sect. 11, *Re Limond*, [1915] 2 Ch. 240; 84 L. J. Ch. 833.

Evidence Acts.

(*b*) The Wills Act is expressly exempt from the operation of the Law of Evidence Acts, 6 & 7 Vict. c. 85(see sect. 1), and 14 & 15 Vict. c. 99 (see sect. 5).

CREDITOR ATTESTING WITNESS.

Sect. 16.

Creditor attesting to be admitted a witness.

XVI. And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor (*a*), notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

(*a*) It would seem that there is here an accidental omission of the words "or the wife or husband of such creditor." But notwithstanding this verbal omission, the wives and husbands of creditors whose debts are charged by the will would, by construction, be admissible witnesses.

EXECUTOR ATTESTING WITNESS.

Sect. 17.

Executor to be admitted as witness.

XVII. And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof (*a*).

(*a*) Of course, an executor who attested the will would forfeit all beneficial interest thereunder, by force of sect. 15, *Hoare* v. *Osborne*, 33 L. J. Ch. 586.

REVOCATION BY MARRIAGE.

Sect. 18.

Will to be revoked by marriage.

XVIII. And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (*a*) (except a will made in exercise of a power of appointment (*b*), when the real or personal estate thereby appointed would not

in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin (*c*), under the Statute of Distributions). Sect. 18.

(*a*) Marriage on the day of, but subsequent to, the execution of a will operates as a revocation, even though it appear from the will itself that the testator did not intend it to take effect until after the marriage, *Otway* v. *Sadleir*, 4 Ir. Jur. (N.S.) 97; followed in *Bucknall* v. *Cooper*, in the Prob. Div., Dec. 1875. Sect. 18 of the Wills Act does not apply to the wills of foreigners domiciled abroad. And as to the effect of the subsequent marriage of a testator domiciled out of England at the time of the marriage, see Dicey, Conflict of Laws, 684. But the will of a foreign testator, made in accordance with the law of his own country, is revoked by marriage, if his domicile is English at the time of his marriage, *Re Martin*, [1900] P. 211; 69 L. J. P. 75. See as to revival of a revoked will, sect. 22, *post*, p. 45 and note. In the case of wills made after 1925, this section is amended by sect. 177 of the Law of Property Act, 1925, which provides: Revocation by marriage.

> **177.**—(1) A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section eighteen of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated.
>
> (2) This section only applies to wills made after the commencement of this Act.

(*b*) As to this exception, see *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *In b. Fenwick*, L. R. 1 P. & D. 319; 36 L. J. P. 54; *In b. Fitzroy*, 1 Sw. & Tr. 133; Sugd. R. P. Stat. 348. If by the same instrument the testator disposes of his own property, and exercises a power falling within the exception, it will be revoked by subsequent marriage, so far as relates to the testator's property, but will be unrevoked so far as relates to the property the subject of the power, *In b. Russell*, 15 P. D. 111; 59 L. J. P. 80; *In b. J. B. Poole*, [1919] P. 10; *Re Paul*, [1921] 2 Ch. 1; 90 L. J. Ch. 446. Marriage no revocation, when.

(*c*) See *In b. M'Vicar*, L. R. 1 P. & D. 671; 38 L. J. P. 84, where the property, in default of appointment, would have gone to the "next of kin," not the next of kin under the statute.

REVOCATION BY PRESUMPTION.

XIX. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances (*a*). Sect. 19.

No will to be revoked by presumption.

(*a*) Where a testator by will dated in 1869, in express exercise of a power contained in his marriage settlement, made certain appointments, and in 1878 executed a deed of appointment which removed four-fifths of the appointed fund from the operation of the will, but which did not purport to revoke the will in any way, it was held that the will remained in force under this section, and operated as to one of the appointments under the deed of 1878 which proved to be in excess of the power, *Re Wells' Trusts*, 42 Ch. D. 646; 58 L. J. Ch. 835. See note to sect. 23.

REVOCATION BY SUBSEQUENT WILL OR CODICIL OR DESTRUCTION OF INSTRUMENT.

Sect. 20.

In what cases wills may be revoked.

XX. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another (*a*) will or codicil executed in manner hereinbefore required, or by some writing (*b*) declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same (*c*) by the testator or by some person in his presence and by his direction (*d*) with the intention of revoking the same (*e*).

Will may be made up of several separate and substantive documents.

(*a*) A testator's testamentary dispositions may be comprised in several separate and substantive documents *In b. Luffman*, 5 No. Cas. 183; *Foley* v. *Vernon*, 7 No. Cas. 119. Writing, appointing executors, *Richards* v. *Queen's Proctor*, 18 Jur. 540; or beginning "This is my last will," *Cutto* v. *Gilbert*, 9 Moo. P. C. 131; *Freeman* v. *Freeman*, 5 D. M. & G. 704; 23 L. J. Ch. 838; *Stoddart* v. *Grant*, 1 Macq. 163; but containing no revoking clause, are not necessarily substantive wills in the sense that, if there be two such writings, the latter will revoke the earlier in date. See also *Lemage* v. *Goodban*, L. R. 1 P. & D. 57; 35 L. J. P. 28; *In b. Fenwick*, L. R. 1 P. & D. 319; 36 L. J. P. 54; *In b. de la Saussaye*, L. R. 3 P. & D. 42; 42 L. J. P. 47; *In b. Petchell*, L. R. 3 P. & D. 153; 43 L. J. P. 22; *Hellier* v. *Hellier*, 9 P. D. 237; 53 L. J. P. 105; *Simpson* v. *Foxon*, [1907] P. 54; 76 L. J. P. 7. But where there were two well-executed substantive and inconsistent wills, one of 1838, the other of 1839, the latter, disposing of the whole of the testator's property, though containing no clause of revocation, nor any appointment of executors, was held to have revoked the former, *Henfrey* v. *Henfrey*, 4 Moo. P. C. 29; see also *In b. Lady E. M. Montagu*, 7 No. Cas. 292; the intention to revoke the earlier may be inferred from the general tenor of the latter will, *Dempsey* v. *Lawson*, 2 P. D. 98; 46 L. J. P. 23; *Chichester* v. *Quatrefages*, [1895] P. 186; 64 L. J. P. 79; *In b. Bryan*, [1907] P. 125; 76 L. J. P. 30; if upon the face of the document the intention is doubtful, parol evidence of intention is admissible, *Jenner* v. *Ffinch*, 5 P. D. 106; 49 L. J. P. 25; and see *In b. Vines*, [1910] P. 147; 79 L. J. P. 25; and statements of the testator, made before or after execution, are admissible to show what papers constitute the will, *Gould* v. *Lakes*, 6 P. D. 1; 49 L. J. P. 59. As to probate of documents not inconsistent, on a compromise, see *Robinson* v. *Clarke*, 2 P. D. 269; 47 L. J. P. 17.

Two substantive and inconsistent wills.

Plenty v. *West*.

Three testamentary papers.

A testator left three testamentary papers; the last two in date were alone admitted to probate, although they disposed but partially of his property, and the first in date, although it disposed of the whole of his property, was rejected, *Plenty* v. *West*, 1 Rob. 264. But the Court of Common Pleas (6 C. B. 210; 17 L. J. C. P. 316) certified that, as to the real estate, the last of the three papers alone constituted the last will; and this opinion was adopted by the M. R. (16 Be. 173).

Where probate is granted of two or more testamentary papers as together containing the last will of the deceased, the grant is made to all the executors named in the several papers, *In b. Morgan*, L. R. 1 P. & D. 323; 36 L. J. P. 64.

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In *In b. Robarts*, L. R. 3 P. & D. 110; 42 L. J. P. 63, in special circumstances, probate was granted of a will and two codicils, power being reserved to the executor (who gave an undertaking) to prove other codicils when they came to his hands.

Appointment, revocation of.

Difficult questions have arisen in cases where testators having powers of appointment have made wills in exercise of such powers, and have afterwards made other wills, not expressed to be in exercise of such powers, nor referring expressly thereto, nor to the former wills, nor disposing of the property comprised therein, but containing general revocatory clauses, or otherwise manifesting an intention to supersede all prior testamentary dispositions.

In *In b. Merritt*, 1 Sw. & Tr. 112; 29 L. J. P. 155, it was held that a will in execution of a power was not revoked by a general revocation in a later will not referring to the power.

In b. Meredith, 29 L. J. P. 155, and *In b. Joys*, 4 Sw. & Tr. 214, were similar in their circumstances to *In b. Merritt*.

On the other hand, in *Sotheran* v. *Dening*, 20 Ch. D. 99, and in *Re Kingdon*, 32 Ch. D. 604; 55 L. J. Ch. 598, the first will was held to be revoked; and *In b. Merritt* and *In b. Joys* were disapproved in *Cadell* v. *Wilcocks*, [1898] P. 21; 67 L. J. P. 8. See also *In b. Eustace*, L. R. 3 P. & D. 183; 43 L. J. P. 46; and *Harvey* v. *Harvey*, 32 L. T. 141.

Abandonment.

A will is not revoked by mere abandonment; to operate as a revocation, there must be some unequivocal act done, of the nature specified in the 20th section, *Andrew* v. *Motley*, 12 C. B. (N.S.) 514; 32 L. J. C. P. 128.

Revocation by a writing.

(*b*) The section distinguishes between a will or codicil and "some writing": and a memorandum simply revoking a will, being only a writing, and not a will or codicil, is not entitled to probate, *In b. Fraser*, L. R. 2 P. & D. 40; 39 L. J. P. 20. In *In b. Durance*, L. R. 2 P. & D. 406; 41 L. J. P. 60, a letter duly attested, whereby the testator directed his brother to obtain his will and burn it, was held to be a writing within this section, and to have revoked the will, and administration was granted with the letter annexed. See also *Toomer* v. *Sobinska*, [1907] P. 106; 76 L. J. P. 19. Where a testator had obliterated the whole of the codicil, including his signature, by thick black marks, and at the foot of it had written the words, signed by himself and attested by two witnesses: "We are witnesses of the erasion of the above," it was held that these words were a "writing declaring an intention to revoke" the codicil, and that it was accordingly revoked, *In b. T. H. Gosling*, 11 P. D. 79; 55 L. J. P. 27.

See also as to the distinction between a "will" or "codicil," and a "writing declaring an intention to revoke a will," *Hawksley* v. *Barrow*, L. R. 1 P. & D. 147; 35 L. J. P. 67.

Cancelling.

(*c*) The word "cancelling" was advisedly omitted from this section (Sugd. R. P. Stat. 353), contrary to the recommendation of the Real Property Commissioners (4 R. P. Com. Rep. Prop. 10, p. 81); and, therefore, probate will be granted of a will in its original shape, though a pen has been drawn through the body of the will, and through the testator's signature, the attestation clause, and the names of the witnesses, *Stephens* v. *Taprell*, 2 Cur. 458; *In b. Fary*, 15 Jur. 1114; *Shaw* v. *Thorne*, 4 No. Cas. 649. See also *In b. Brewster*, 29 L. J. P. 69; *In b. De Bode*, 5 No. Cas. 189. And the words "otherwise destroying" are not satisfied if the will remains actually uninjured, *Cheese* v. *Lovejoy*, 2 P. D. 251; 46 L. J. P. 66.

Sect. 20.

Mutilation of will.

That a will may be revoked by tearing, it is not necessary to rend the will into more pieces than it originally consisted of; but it is sufficient if the testator intended the tearing actually done of itself to work a revocation, without any further act, *Elms* v. *Elms*, 1 Sw. & Tr. 155; 27 L. J. P. 96.

That a will may be revoked in part only, by tearing, see *Christmas* v. *Whinyates*, 3 Sw. & Tr. 81; 32 L. J. P. 73; *In b. Woodward*, L. R. 2 P. & D. 206; 40 L. J. P. 17; *In b. Maley*, 12 P. D. 134; 56 L. J. P. 112.

From the peculiar manner in which the mutilation (by cutting and tearing) of a duly executed will was made, the Court held the will not to be totally revoked, but to have been altered so as to form the draft for a new will, and probate was granted of the will as it stood after the mutilation, *Clarke* v. *Scripps*, 2 Rob. 563; and if the mutilation may have been accidental, the state of the paper will be considered, *Bigge* v. *Bigge*, 9 Jur. 192. Also probate may be granted of a will which has been torn up by a testator in a fit of intoxication, and afterwards pasted together again by him when sober, if it is clear that there was no intention to revoke the will, *In b. Brassington*, [1902] P. 1; 71 L. J. P. 9.

By pen and ink.

By cutting.

But if parts of a will are obliterated by pen and ink so as to be illegible, *Townley* v. *Watson*, 3 Cur. 761; or cut away, as with a knife or a pair of scissors, *In b. Cooke*, 5 No. Cas. 390, there is a revocation as to the obliterated or destroyed parts. See also *In b. Lambert*, 1 No. Cas. 131.

Cutting out signature.

A will is revoked by the testator cutting out the signature, *Hobbs* v. *Knight*, 1 Cur. 768. And where the signature had been cut out, but gummed on its former place, the gumming on did not revive the will, *Bell* v. *Fothergill*, L. R. 2 P. & D. 148. A will found in the testatrix's repositories with her signature and that of the witnesses scratched out with a knife, there being at the bottom of the will a memorandum in her handwriting, but not executed, whereby, for reasons given, the will was declared to be cancelled, was held to be revoked, *In b. Morton*, 12 P. D. 141; 56 L. J. P. 96.

Dependent relative revocation.

If the mutilation of a will takes place with a view to the execution of a new will, and the new will be not executed, the prior will, as it stood before mutilation, will be entitled to probate, *In b. Cockayne*, D. & Sw. 177; *Elms* v. *Elms*, 1 Sw. & Tr. 155; 27 L. J. P. 96; see also *In b. Eeles*, 2 Sw. & Tr. 600; 32 L. J. P. 4; *In b. Smith*, 1 No. Cas. 315. So likewise where a will is destroyed or mutilated by the testator only because he supposes he has executed another will, *Onions* v. *Tyrer*, 1 P. W. 343; *Dancer* v. *Crabb*, L. R. 3 P. & D. 98; 42 L. J. P. 53. And see *Re Bernard's Settlement*, [1916] 1 Ch. 552; 85 L. J. Ch. 414; *Ward* v. *Van der Loeff*, [1924] A. C. 653; 93 L. J. Ch. 397. Where a will is destroyed on the incorrect assumption that a subsequent will is well executed and operative, the first will is not revoked, and secondary evidence of its contents will be admitted, *Scott* v. *Scott*, 1 Sw. & Tr. 258; *In b. Middleton*, 3 Sw. & Tr. 583; 34 L. J. P. 16. And see *Dixon* v. *Treasury Solicitor*, [1905] P. 42; 74 L. J. P. 33. The burning of a will by a testator on the assumption that by intestacy all went to his wife was held to be a conditional revocation, and the assumption being mistaken, the will was held not revoked, *Re Southerden*, [1925] W. N. 187.

Where a testator, having duly executed his will, subsequently, in the presence of his executor, partially erased his own signature, with the intention of writing it in better style, and thereupon wrote it again in

the presence of the executor, but not of the attesting witnesses, the instrument was admitted to probate, the original signature being taken as restored, *In b. Kennett*, 2 N. R. 461. A testatrix, being under an erroneous impression that a codicil had not been duly executed, directed it to be torn up and sent to her solicitor to be re-copied, but she died before she could re-execute it. In the circumstances the codicil was admitted to probate, *In b. Thornton*, 14 P. D. 82; 58 L. J. P. 82.

A testator, on the execution of a will in 1895, caused a will of 1882 to be cancelled under the erroneous belief that certain funds comprised in a settlement made on his first marriage would, in the absence of certain provisions in the will of 1882, be divided equally amongst the children of the first marriage. In 1896 he executed a fresh will, revoking the will of 1895, and later, in 1896, he executed two codicils, but the settled funds were not mentioned in any of the documents of 1896. It was held that the will of 1882 was, in law, a valid and subsisting testamentary document, and that it should be included with the three documents of 1896 in the probate, *Stamford* v. *White*, [1901] P. 46; 70 L. J. P. 9.

Animus revocandi.

Will burnt by mistake, or in a fit of madness.

The act of destruction of a will must be done *animo revocandi*, and must be complete, in order that the will may be revoked. Therefore, where a duly-executed will has been burnt by mistake, *In b. Thornton*, 2 Cur. 913; or by the testator in a fit of madness, *In b. Downer*, 18 Jur. 66; or *delirium tremens*, *Brunt* v. *Brunt*, L. R. 3 P. & D. 37; or where suffering from softening of the brain, *In b. Hine*, [1893] P. 282; 63 L. J. P. 45; probate will be allowed of a copy or draft; or if a will is torn under the false impression that it is invalid, *Giles* v. *Warren*, L. R. 2 P. & D. 401; 41 L. J. P. 59. And where a will was executed by a testator when sane, and he subsequently became insane, and the will was found mutilated at his death, it was held that the *onus* of proof, that the testator mutilated his will whilst sane, lay upon those who contested the will, *Harris* v. *Berrall*, 1 Sw. & Tr. 153; (cf. *Re Taylor*, 64 S. J. 148); and if the will cannot be found, and there is no evidence as to the date of its destruction, probate will be granted of the contents as contained in a copy, *Sprigge* v. *Sprigge*, L. R. 1 P. & D. 608; 38 L. J. P. 4. In *Mills* v. *Millward*, 15 P. D. 20; 59 L. J. P. 23, a will was destroyed in testatrix's presence, but against her wish. Subsequently, though pressed to make a new will she refused, saying that it must remain as it was. It was held that the will was not revoked, and that probate might be granted of the will as contained in an affidavit of the executor. Whether the testatrix could ratify such a destruction so as to make it a revocation within sect. 20, *quære*. See also *Gill* v. *Gill*, [1909] P. 157; 78 L. J. P. 60. And where a testator, having duly executed a codicil to his last will, destroyed the will under the impression that it was of no further use, the Court admitted the contents of the will, as set forth in the draft thereof, together with the codicil, to probate, *Beardsley* v. *Lacey*, 67 L. J. P. 35.

Cutting off witness's signature.

Tearing off seal and part of will.

A will once well executed is not revoked by the cutting off, with the privity of the testator, of the signature of one of the witnesses, for the purpose of its being re-written, *In b. Tozer*, 7 Jur. 134. See also *In b. Coleman*, 2 Sw. & Tr. 314; 30 L. J. P. 170. But where a testator, *animo revocandi*, tears off the seal and a syllable of a word in the body of the will, *Price* v. *Powell*, 3 H. & N. 341; or the signature and attestation clause, *In b. Lewis*, 1 Sw. & Tr. 31; 27 L. J. P. 31; or the attestation clause and the names of the witnesses, *Abraham* v. *Joseph*,

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5 Jur. (N.S.) 179; or the names of the witnesses only, *Evans* v. *Dallow*, 31 L. J. P. 128; this is a complete revocation.

Will torn, and pen drawn through testator's signature.

Where a will was found with the testator's signature torn off the first four sheets, and a pen run through the signature on the fifth and last sheet, and there was evidence produced of an intention to revoke, the will was held to be revoked, *Williams* v. *Tyley*, Joh. 530. See also *In b. Simpson*, 5 Jur. (N.S.) 1366; *In b. Harris*, 3 Sw. & Tr. 485; 33 L. J. P. 181. But after due execution is proved, the burden of proving that the will has been revoked lies upon those who set up the revocation, and will not be assumed in the absence of evidence; thus a will of 1834 was found, after the testator's death in 1870, with the signature crossed out, but there being no evidence when the crossing out was done, the Court refused to presume that it was before 1838, *Benson* v. *Benson*, L. R. 2 P. & D. 172; 40 L. J. P. 1.

Tearing in a fit of anger.

The question whether a will was revoked by the testator's tearing it in a fit of anger into four pieces, where he afterwards desired his housekeeper to sew them together again, was raised but not decided in *In b. Colberg*, 2 Cur. 832; but see *Doe* v. *Perkes*, 3 B. & Ald. 489; and cf. *Jinkin* v. *Cowling*, [1924] P. 113; 93 L. J. P. 43.

As to revocation of codicils by destruction of will.

Under the old law, a codicil was *prima facie* dependent on the will, and the destruction of the will was an implied revocation of the codicil, but the destruction of a will was not necessarily a revocation of the codicil. In some cases under the present law it appears to have been considered that the question was one of intention, and that if there was evidence of intention to revoke it, the codicil, though existent, would be revoked by the destruction of the will, see *Clogstoun* v. *Wolcott*, 5 No. Cas. 623; *Grimwood* v. *Cozens*, 2 Sw. & Tr. 364; *In b. Dutton*, 3 Sw. & Tr. 66; 32 L. J. P. 137; *In b. Greig*, L. R. 1 P. & D. 72; 35 L. J. P. 113; but it is now established that a codicil can only be revoked by one of the modes indicated in sect. 20, and is not in any case under the new law revoked simply by the destruction of the will, *Black* v. *Jobling*, L. R. 1 P. & D. 685; 38 L. J. P. 74; *In b. Savage*, L. R. 2 P. & D. 78; 39 L. J. P. 25; *In b. Turner*, L. R. 2 P. & D. 403; *Gardiner* v. *Courthope*, 12 P. D. 14; 56 L. J. P. 55. See, however, *In b. Bleckley*, 8 P. D. 169; 52 L. J. P. 102, where a testator having executed a codicil at the foot of his will, cut off his signature to the will, believing that he thereby destroyed also the codicil, which, however, he left unmutilated. Sir J. Hannen held that the circumstances showed an intention to revoke both the will and the codicil, and that the latter was revoked. A codicil revoking a will does not necessarily revoke a prior codicil. The question is whether the testator distinguishes between the will and codicils, *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19; 42 L. J. Ch. 809.

Revocation by destruction.

(*d*) The power to revoke a will in the testator's absence cannot be delegated; therefore the direction by a testator that his will shall be destroyed, either in his lifetime, *Rooke* v. *Langdon*, 2 L. T. (O.S.) 495; *In b. Dadds*, D. & Sw. 290; or after his death, *Stockwell* v. *Ritherdon*, 1 Rob. 661, is inoperative, the Act requiring the destruction to be in the presence and by the direction of the testator. So where a will was burnt by the direction, but not in the presence of the testator, the draft was admitted to probate, *In b. Dadds*, *ubi sup.* And where a wife destroyed her husband's will without his consent, the Court, on admitting a copy of the will to probate, ordered the costs to be paid by the widow, *Horne* v *Horne*, Prob. Ct., Dec. 1859.

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(*e*) Where a will which is traced into the hands of a testator, *Patten* v. *Poulton*, 1 Sw. & Tr. 55; 27 L. J. P. 41, or that part of a will executed in duplicate which is retained by the testator in his own possession, *Saunders* v. *Saunders*, 6 No. Cas. 518, is not forthcoming at the testator's death, the presumption of law is, that it has been destroyed by him *animo revocandi*; this presumption may be rebutted by circumstances, *ib.*; see also *In b. Hains*, 5 No. Cas. 621; *Battyll* v. *Lyles*, 4 Jur. (N.S.) 718; *Whiteley* v. *King*, 5 N. R. 12; but will prevail until it is rebutted by satisfactory evidence, *Eckersley* v. *Platt*, L. R. 1 P. & D. 281; 36 L. J. P. 7; *Allan* v. *Morrison*, [1900] A. C. 604; 69 L. J. P. C. 141. In *James* v. *Shrimpton*, 1 P. D. 431; 45 L. J. P. 85, a will, revoked by marriage, was revived by codicil, but at the testator's death the codicil could not be found; on proof of intention to adhere to the will, probate was granted of the will and the draft of the codicil. *In b. Debac*, 77 L. T. 374, a testator made and duly executed a will and afterwards a codicil revoking certain portions of the will. The documents were kept by the testator in separate sealed envelopes. On his death the will only was found, with the seal of the envelope containing it broken. It was held that although the presumption of law must prevail as to the destruction of the codicil, probate could only be granted of such parts of the will as the codicil by its execution had not revoked. As to the admissibility of declarations made by a testator as to his intention in such cases, see *Keen* v. *Keen*, L. R. 3 P. & D. 105; 42 L. J. P. 61. Oral declarations made by a testatrix are inadmissible to prove the destruction by her of a duplicate of the will, or of the fact that there was such a duplicate, *Atkinson* v. *Morris*, [1897] P. 40; 66 L. J. P. 17.

Will not forthcoming at testator's death.

The cases under the old law upon wills executed in duplicate are collected in Sugd. R. P. Stat. 350, n. See also 1 Wms. Exors. 115; *Doe* v. *Strickland*, 8 C. B. 724; 19 L. J. C. P. 89. Those cases are applicable to the present law.

Duplicate wills.

Where a portion of a will was found locked up in the testator's bureau, the first sheet, containing the substance of the will, being detached and missing, it was held, on the presumption of law, that the mutilation was done by the testator *animo revocandi*, *Williams* v. *Jones*, 7 No. Cas. 106. But where a will, which had been well executed, was found after the testator's death with his signature erased, and his name re-written a little below the place of the first signature, it was held that this erasure had not been made *animo revocandi*, and probate was allowed with the original signature restored, and the second signature omitted, *In b. King*, 2 Rob. 403.

Part only of a will found at testator's death.

A will on six or eight sheets was signed by the testator and by witnesses; after the testator's death two only of the inner sheets were found; as the last sheet, upon which alone was the execution required by the statute, was not forthcoming, the Court presumed a revocation, *In b. Gullan*, 1 Sw. & Tr. 23; 27 L. J. P. 15; *Gullan* v. *Grove*, 26 Be. 64.

Last sheet missing.

And so a codicil not found with the will and other codicils is presumed to have been revoked, *In b. Shaw*, 1 Sw. & Tr. 62.

Codicil not forthcoming.

If a will be lost or destroyed, without the intention of revoking it, and the substance thereof can be ascertained by means of the original instructions, or by a copy of the will, or by the recollection of persons who heard it read over, probate will be granted of a paper embodying such substance, Taylor, Evidence, 307; *Brown* v. *Brown*, 8 E. & B. 886; 27 L. J. P. 20; *Harris* v. *Knight*, 15 P. D. 170; *In b. Phibbs*, [1917] P. 93; 86 L. J. P. 81. The contents of a lost will may be proved by

Probate of copy, or of substance of will.

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secondary evidence; declarations of the testator, before execution, are admissible; the contents may be proved by a single witness; and when the contents are not completely proved, probate will be granted to the extent of which they are proved, *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; 45 L. J. P. 49; provided that the contents as proved are really substantially the testamentary intentions of the testator. Where evidence was given as to the person appointed residuary legatee, but the evidence did not show the nature and amount of the previous bequests in the will, nor the names of the legatees, and it was thus impossible to ascertain what the testator intended the residuary legatee to take, a grant of probate on such evidence was refused, *Woodward* v. *Goulstone*, 11 A. C. 469; 56 L. J. P. 1. The proof of a will that has been destroyed or lost is viewed by the Court with jealousy and mistrust, *Moore* v. *Whitehouse*, 3 Sw. & Tr. 567; 34 L. J. P. 31; the due execution of the will, and it existence after the death of the testator, should in general be proved, and a satisfactory explanation given of the circumstances attending the destruction or loss, see *Burls* v. *Burls*, L. R. 1 P. & D. 472; 36 L. J. P. 125. As a rule, a draft or copy is required to be propounded before admitting it to probate, though probate of a draft *may* be obtained on motion, *In b. Barber*, L. R. 1 P. & D. 267; 36 L. J. P. 19. In *Mills* v. *Millward*, 15 P. D. 20; 59 L. J. P. 23, probate of a will as contained in an affidavit of the executor was granted, the will having been destroyed without intention of revoking it. Where the will of a testator was, after his death, torn into pieces by one of his sons while a copy was being made by an executor, but, after most of the pieces had been recovered and gummed together there were still some blanks left, though the copy showed what all the words omitted in the blanks had been, probate was granted of the incomplete will and the copy as together constituting the will of the deceased, *In b. Leigh*, [1892] P. 82; 61 L. J. P. 124. See also *Gill* v. *Gill*, [1909] P. 157; 78 L. J. P. 60.

OBLITERATIONS AND INTERLINEATIONS.

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No alteration in a will shall have any effect unless executed as a will.

XXI. And be it further enacted, That no obliteration, interlineation (*a*), or other alteration made in any will after the execution thereof shall be valid or have any effect (*b*), except so far as the words or effect of the will before such alteration shall not be apparent (*c*), unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will (*d*); but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses (*e*) be made in the margin or on some other part of the will opposite or near to such alteration (*f*), or at the foot or end of or opposite to a memorandum referring to (*g*) such alteration and written at the end or some other part of the will (*h*).

(*a*) As to the interlineations, see *In b. White*, 6 Jur. (N.S.) 808; *In b. Birt*, L. R. 2 P. & D. 214; 40 L. J. P. 26.

Alterations presumed to be made

(*b*) Alterations appearing on the face of a will are, in the absence of satisfactory evidence, intrinsic or extrinsic, to the contrary, presumed to have been made after the execution, and are therefore held not to

form part of the will, *Burgoyne* v. *Showler*, 1 Rob. 5; *Cooper* v. *Bockett*, 4 Moo. P. C. 419; *Greville* v. *Tylee*, 7 Moo. P. C. 320; and see *Gann* v. *Gregory*, 3 D. M. & G. 777; 22 L. J. Ch. 1059; *Simmons* v. *Rudall*, 1 Sim. (N.S.) 115; *Doe* v. *Palmer*, 16 Q. B. 747; 20 L. J. Q. B. 367; *Keigwin* v. *Keigwin*, 3 Cur. 607; *Williams* v. *Ashton*, 1 J. & H. 115; *In b. Hindmarch*, L. R. 1 P. & D. 307; 36 L. J. P. 24; see also *In b. Cadge*, L. R. 1 P. & D. 543; 37 L. J. P. 15, where a distinction was taken between interlineations and alterations.

after execution.

Interpolated sheets.

In *In b. Countess of Morton*, 13 Jur. 1108, a sheet substituted for an original sheet of the will was assumed to have been substituted before execution. But in *Treloar* v. *Lean*, 14 P. D. 49; 58 L. J. P. 39, the evidence showed that those sheets which had been substituted by the testator for original sheets had been substituted after execution, and probate of the will was refused. The legal presumption is that papers bound together, and constituting the will as found at the testator's death, were so bound together at the time of execution, *Rees* v. *Rees*, L. R. 3 P. & D. 84.

Parol declarations of testator.

Where several undated interlineations appeared in a will, upon evidence of the parol declarations of the testator made before the date of the will, one of those interlineations was admitted to probate, *In b. Foley*, 25 L. T. (o.s.) 311. Verbal and written statements made by a testator in and about the making of his will, when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the will, *Johnson* v. *Lyford*, L. R. 1 P. & D. 546; 37 L. J. P. 65. Parol declarations made before the date of the will are admissible, *Doe* v. *Palmer*, 16 Q. B. 747; 20 L. J. Q. B. 367; *Dench* v. *Dench*, 2 P. D. 60; 46 L. J. P. 13; but parol declarations after execution are inadmissible, *Atkinson* v. *Morris*, [1897] P. 40; 66 L. J. P. 17; *In b. Jessop*, [1924] P. 221; 93 L. J. P. 135. As to declarations made after the date of the will, but before the execution of a codicil confirming the will, see *In b. Sykes*, L. R. 3 P. & D. 26; 42 L. J. P. 17. And see *Keen* v. *Keen*, L. R. 3 P. & D. 105; 42 L. J. P. 61, as to declarations of intention to adhere or not to adhere to a will. Compare Ste. Evid., art. 29.

Blanks filled up in black and red ink.

Blanks in a will were filled up by the testator, as to part in black, and as to the rest in red ink; upon the circumstances of the case the former were held to have been filled in before, the latter after execution, *Birch* v. *Birch*, 1 Rob. 675.

Parts of will in different ink or handwriting.

The mere circumstance of the amount of a legacy or the name of a legatee being inserted in different ink, and in a different handwriting, does not alone constitute an "obliteration, interlineation, or other alteration," within the meaning of the statute, nor does any presumption arise therefrom against a will having been duly executed in the form in which it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been "superinduced by other writing." In such circumstances the *onus* lies upon the person who alleges such alteration to have been made prior to execution to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator, *Greville* v. *Tylee*, 7 Moo. P. C. 320.

Affidavits of witnesses.

Where alterations, obliterations, and erasures appear on the face of a will, all the witnesses must join in the affidavit produced on the demand of probate; or the absence of a witness should be explained and accounted for, *In b. Townsend*, 5 No. Cas. 146.

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Probate in *fac simile*.

In *Gann* v. *Gregory*, 3 D. M. & G. 777; 22 L. J. (N.S.) Ch. 1059; *Shea* v. *Boschetti*, 18 Be. 321; 23 L. J. Ch. 652; *In b. Kendall*, 4 No. Cas. 317; *In b. Smith*, 3 Sw. & Tr. 589; 34 L. J. P. 19, probate was granted in *fac simile*, thus leaving it to a court of construction to decide as to the effect of the alterations and interlineations. In *Gann* v. *Gregory*, Lord Cranworth, C., held that the will was to be read as if the parts through which ink lines had been run formed no part of the will.

Production, in court, of original will.

In construing a will, a court of construction will look at the original will and not merely at the probate copy, *Compton* v. *Bloxham*, 2 Coll. 201; 14 L. J. (N.S.) Ch. 380; *Manning* v. *Purcell*, 7 D. M. & G. 55; 24 L. J. Ch. 522; *Re Harrison*, 30 Ch. D. 390; 55 L. J. Ch. 799.

Unattested erasures.

(*c*) The obliteration of a bequest, with the addition of the unattested words "erased by me, M. L.," written by the testator, is not a revocation if the original words are "apparent" on the face of the will; and to ascertain this fact the evidence of engravers and other experts and the use of magnifying glasses are admissible, *Cooper* v. *Bockett*, 4 Moo. P. C. 419; *In b. Oppenheim*, 17 Jur. 306; *In b. Ibbetson*, 2 Cur. 337; *In b. Beavan*, 2 Cur. 369; *Ffinch* v. *Combe*, [1894] P. 191; 63 L. J. P. 113; 4 R. P. Com. Rep. 31; *Re Brasier*, [1899] P. 36; 68 L. J. P. 6. As to the removal of pieces of paper gummed over portions of the will, see *In b. Horsford*, L. R. 3 P. & D. 211; 44 L. J. P. 9; *In b. Gilbert*, [1893] P. 183; 44 L. J. P. 9; *Ffinch* v. *Combe*, [1894] P. 191; 63 L. J. P. 113. As to the evidence of experts, see *In b. Rushout*, 13 Jur. 458; *In b. Abbey*, 5 No. Cas. 615.

Evidence of experts.

Obliteration with unattested substitution.

Where a testator, by means of an erasure made with a knife, intended to revoke a legacy, and then by writing over the erasure to substitute a sum different from that originally given, such substituted legacy, if unsigned and unattested, is not effectually given, and the original legacy is not revoked, although its amount is no longer "apparent," and parol evidence is admissible to show what the original legacy was, *Brooke* v. *Kent*, 3 Moo. P. C. 334; see also *In b. Reeve*, 13 Jur. 370; *Soar* v. *Dolman*, 3 Cur. 121; *In b. Nelson*, Ir. R. 6 Eq. 569; *Jeffery* v. *Cancer Hospital*, 57 L. T. 600; and probate will be granted of the will in its original state. This is in accordance with the authorities referred to, *ante*, p. 39, as too dependent relative revocation. So also in the case of an unattested obliteration of an executor's name and substitution of another name, *In b. Parr*, 6 Jur. (N.S.) 56; *In b. Harris*, 1 Sw. & Tr. 536; *In b. Greenwood*, [1892] P. 7; 61 L. J. P. 56. But if the erased words are not apparent and proof cannot be given as to the original words, probate will be granted in blank as to the erased parts, *In b. James*, 1 Sw. & Tr. 238; *In b. Livock*, 1 Cur. 906; *In b. Ibbetson*, 2 Cur. 337; *Doherty* v. *Dwyer*, 25 L. R. Ir. 297; *In b. Nelson*, I. R. 6 Eq. 569.

"Apparent," meaning of.

The word "apparent" means "apparent on an inspection of the document itself," 1 Wms. Exors. 107; *Townley* v. *Watson*, 3 Cur. 761.

Obliteration without substitution.

Where the words forming the gift of a legacy, *Townley* v. *Watson*, *sup.*, are *animo revocandi*, and without any intention of substituting another gift, so obliterated by the testator with pen and ink as to be illegible, this is a complete revocation of the legacy, and parol evidence will be inadmissible to restore the will.

With substitution.

But the principle of dependent relative revocation applies to a case where the testator has erased the name of a legatee so that it is no longer apparent, and has substituted another name for it; and if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new

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legatee, the Court will receive evidence to show what the original name was, *In b. M'Cabe*, L. R. 3 P. & D. 94; 42 L. J. P. 79. See also *In b. Horsford*, L. R. 3 P. & D. 211; 44 L. J. P. 9; *Ffinch* v. *Combe*, [1894] P. 191; 63 L. J. P. 113, in both which cases the testator had pasted paper over certain parts of his will; and see *Sturton* v. *Whetlock*, 52 L. J. P. 29; *In b. Nelson*, I. R. 6 Eq. 569.

Interlineations, &c., subsequent codicil.

(*d*) The presumption that alterations and obliterations were made after the execution holds even where a codicil has been well executed, *Lushington* v. *Onslow*, 6 No. Cas. 183; *Rowley* v. *Merlin*, 6 Jur. (N.S.) 1165; *In b. Bradley*, 5 No. Cas. 95; *Christmas* v. *Whinyates*, 3 Sw. & Tr. 81; 32 L. J. P. 73. To rebut this presumption, alterations and obliterations in a will must be referred to and identified in the subsequent well-executed codicil, or be proved to have existed before the date of the codicil, *In b. Mills*, 11 Jur. 1070; *In b. Mogg*, 1 No. Cas. 325; *In b. Wyatt*, 2 Sw. & Tr. 494; 31 L. J. P. 197; *In b. Bradley*, 5 No. Cas. 95; *Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216; 60 L. J. P. 86; *In b. Heath*, [1892] P. 253; 61 L. J. P. 131; *Oldroyd* v. *Harvey*, [1907] P. 326; 76 L. J. P. 161. Nor are unattested additions to a will made part of the testamentary instrument by a subsequently well-executed codicil beginning, "By this codicil to my will," *Haynes* v. *Hill*, 1 Rob. 795; but see *In b. Tegg*, 4 No. Cas. 531; *Neate* v. *Pickard*, 2 No. Cas. 407. As to the effect of a codicil upon unsigned and unattested cancellations in a prior will, see *Re Hay*, [1904] 1 Ch. 317; 73 L. J. Ch. 33.

Alterations attested by signatures of testator and witnesses.

(*e*) The names, *In b. Wingrove*, 15 Jur. 91; or the initials, *In b. Hinds*, 16 Jur. 1161; *In b. Blewitt*, 5 P. D. 116; 49 L. J. P. 31, of the testator and witnesses placed in the margin of the will near the alteration are sufficient to make the alteration part of the will, without any memorandum of attestation referring to the alteration.

If alterations are made in a will after execution, the mere writing by the witnesses of their names opposite to the alterations at the request of the testator will have no effect, *In b. Cunningham*, 4 Sw. & Tr. 194; 29 L. J. P. 71; but if a testator having made alterations in a will produces the will to the witnesses and acknowledges his signature thereto, and they then sign their names to the will *animo testandi*, and not merely to the alterations, this will amount to a new execution of the will, and the alterations previously made will then be validated, *In b. Dewell*, 17 Jur. 1130.

(*f*) See *In b. Wilkinson*, 6 P. D. 100, where there were alterations in the same sentence, which began on the second and were continued on the third side (*sic*) of a sheet of paper.

(*g*) See *In b. Treeby*, L. R. 3 P. & D. 242; 44 L. J. P. 44, as to what is sufficient reference.

Affidavits.

(*h*) As to the necessity for affidavits of execution in the case of the testator and witnesses writing their names or initials in the margin or near to the alterations, or in the case of a memorandum referring to the alterations, see 15 Jur. 91 (n.).

REVIVAL OF REVOKED WILL.

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No revoked will to be revived otherwise than by

XXII. And be it further enacted, That no will or codicil or any part thereof which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required and showing an intention to revive the same; and when any will or codicil

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re-execution or a codicil.

which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof unless an intention to the contrary shall be shown (*a*).

Implied revival of will abolished.

(*a*) As in the preceding sections the object of the legislature appears to have been to put an end to implied revocations of testamentary papers, so by the 22nd section the aim is to do away with implied revivals. It would seem that the "intention to revive" a revoked will by a codicil, which is required by this section, can be shown only by the contents of the codicil itself, and that no act *dehors* the codicil can be resorted to for the purpose of establishing the intention, *Marsh* v. *Marsh*, 1 Sw. & Tr. 528; 30 L. J. P. 77. In that case, twenty-seven wills and codicils were found after the testator's death, besides a large number of incomplete testamentary papers; a codicil of 1858 was tied by a piece of tape to a will of 1851, which will had been revoked by another will of 1856. It was held that this merely physical annexation of the codicil was no ground for inferring the intention to revive required by sect. 22, and probate was granted of the will of 1856 and the codicil of 1858.

Destruction of revoking instrument.

A duly-executed will, if once revoked by a subsequent will containing a clause of revocation, is not revived by the destruction of such subsequent will, *Major* v. *Williams*, 3 Cur. 432; *Stride* v. *Sandford*, 17 Jur. 263; and parol evidence of an intention to revive the will is inadmissible (*ib.*). In *In b. Hodgkinson*, [1893] P. 339; 62 L. J. P. 116, a testator by his will gave all his property to I. S., and appointed her sole executrix. Afterwards he made a second will, devising his real estate to his sister E. and appointing her sole executrix; but he did not revoke the first will. He subsequently destroyed the second will. *Held*, that the first will was partially revoked by the second, and that the revoked part of the first will was not revived by the revocation of the second; therefore, that probate must be granted of the first will limited to such part of the testator's property as was not comprised in the second will, and that as to such part as was comprised in the second will there was an intestacy. But if a testator destroys a will solely with a view to revive a former will, then, in accordance with the doctrine of dependent relative revocation, such destruction will not operate as a revocation, *Powell* v. *Powell*, L. R. 1 P. & D. 209; 35 L. J. P. 100; *Cossey* v. *Cossey*, 69 L. J. P. 17; a doctrine which was apparently overlooked in *Tharp* v. *Tharp*, [1916] 1 Ch. 142; 85 L. J. Ch. 162.

Dependent relative revocation.

Extrinsic evidence.

Extrinsic evidence was admitted to show with what object a testator had republished a will which, as to one bequest, he had varied by a codicil dated prior to such republication, *Upfill* v. *Marshall*, 7 Jur. 819; *Wade* v. *Nazer*, 1 Rob. 627. In the latter case, the re-execution of the will alone was held not to revoke a codicil to that will.

Loss of revoking instrument.

A testator duly executed his will, and afterwards executed another will which was not found at his death; of the contents of the second nothing was known, except that it was headed "last will and testament"; it was held in the Prerogative Court that the former will (which was found at the testator's death) was revoked by the latter, that the former was not revived by the second will not being forthcoming, and that there was an intestacy, but this decision was reversed by the Privy Council, *Cutto* v. *Gilbert*, 9 Moo. P. C. 131; *Hellier* v. *Hellier*, 9 P. D. 237; 53 L. J. P. 105. But if, in similar circumstances, it can be

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proved, by strong and conclusive evidence, that the second will revoked the first, there is an intestacy, *In b. Brown*, 1 Sw. & Tr. 32; 27 L. J. P. 20; *Brown* v. *Brown*, 8 E. & B. 886; 27 L. J. Q. B. 173; *Wood* v. *Wood*, L. R. 1 P. & D. 309; 36 L. J. P. 34.

Legacy, substitution by codicil, and revocation of codicil.

Where a sum of £100 was given by will to a legatee, afterwards in substitution a sum of £500 was given by a codicil to the same legatee, and then the latter gift was revoked, the legatee was not entitled to the £100, *Boulcott* v. *Boulcott*, 2 Drew. 25; 23 L. Ch. 57.

Revival of will.

A testator in 1837 executed his will in duplicate, one part being kept by himself, the other by his solicitor; on the execution in 1838 by the testator of a second will, revoking in terms the prior one, the part of the prior will in the possession of the solicitor was destroyed by the testator, but the part in the testator's possession remained untouched down to the time of his death; in 1839 the testator made a codicil, which referred to the will of 1837 by its date; that will was held to be revived, and parol evidence was not admitted to prove a mistake in the date, *Payne* v. *Trappes*, 1 Rob. 583. See also *In b. Chapman*, 1 Rob. 1; *In b. Goodenough*, 2 Sw. & Tr. 141; 30 L. J. (N.S.) P. 166; *In b. Lewis*, 7 Jur. (N.S.) 220; *In b. Wyatt*, 2 Sw. & Tr. 494; 31 L. J. P. 197; *In b. Chilcott*, [1897] P. 223; 66 L. J. P. 108. See also *In b. Reade*, [1902] P. 75; 71 L. J. P. 45. A will which has been revoked, in order that it may be revived by a subsequent codicil, must be in existence at the date of the reviving codicil, and must be clearly identified, *Newton* v. *Newton*, 12 Ir. Ch. Rep. 118. If there is any doubt or ambiguity with respect to the document referred to by the testator, extrinsic evidence will be admissible, *Thomson* v. *Hempenstall*, 7 No. Cas. 141; *Quincey* v. *Quincey*, 11 Jur. 111. And the execution by a testator, after his marriage, of a codicil referring to "my last will" (there being only one will in existence), was held to revive a will made before the testator's marriage, *Neate* v. *Pickard*, 2 No. Cas. 407. And see *In b. Terrible*, 1 Sw. & Tr. 140.

Two codicils only admitted to probate.

In the circumstances detailed in *Hale* v. *Tokelove*, 2 Rob. 319, there were admitted to probate two codicils only; one executed will and the draft of another will, referred to in one of the codicils, being rejected; and *In b. Dendy*, 15 Jur. 1042, a will and the first and fourth codicils only were admitted to probate.

See also *In b. Harper*, 7 No. Cas. 44, the marginal note to which requires correction; and the notes to sect. 20, *ante*, pp. 36 *et seq.*

REVOCATION—SUBSEQUENT CONVEYANCE.

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When a devise not to be rendered inoperative, &c.

XXIII. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (*a*).

Revocation by alteration of estate abolished.

(*a*) Revocation by alteration of estate is abolished, *Ford* v. *De Pontès*, and *De Pontès* v. *Kendall*, 31 L. J. Ch. 185. The acquisition of a larger estate, *Saxton* v. *Saxton*, 13 Ch. D. 359; 49 L. J. Ch. 128; or a larger

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interest, *Re Russell*, 19 Ch. D. 432; 51 L. J. Ch. 401, does not affect the validity of a testamentary disposition, which takes effect upon the estate or interest as existing at the testator's death. Compare the note to sect. 24, *post*.

Scope of this section.

In Carson's Real Property Statutes the scope of this section is thus defined: "This clause of the Act applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to bar dower, but it does not apply to cases where the thing meant to be given is gone."

As to unpaid purchase-money of real estate specifically devised.

Under this section it has been held that where a testator subsequently to his will contracted for the sale of an estate which he had specifically devised, and the contract remained uncompleted at his decease, the purchase-money belonged to his personal representatives as part of his personal estate, and not to the devisees of the property, the testator having, at the time of his death, merely a claim for the purchase-money, with a lien on the estate for its payment, which lien, it was considered, was not such an interest as was in the contemplation of the legislature in the concluding part of this section, *Farrar* v. *Earl of Winterton*, 5 Be. 1. And the result is not varied by the fact that the purchaser had deposited the title deeds of the said property with the vendor, as security for part of the purchase-money; the clause applies to cases where testators, having devised their estates, make conveyances of them, merely modifying the ownership, and not to cases where the thing to be given is gone, *Moor* v. *Raisbeck*, 12 Sim. 123. In *Re Clowes*, [1893] 1 Ch. 214, a testator being absolutely entitled to a freehold estate specifically devised it to H. Afterwards he sold the estate to a purchaser, and on the following day the property was reconveyed to him by way of mortgage for securing part of the purchase-money which was allowed to remain charged on the estate. *Held*, that the sum secured by the mortgage did not pass to the specific devisee. See also *Re Bick*, [1920] 1 Ch. 488; 89 L. J. Ch. 335. Nor is the result varied by the fact that the sale was compulsory under the powers of a private Improvement Act, *Ex parte Hawkins*, 13 Sim. 569; or a Railway Act, *Re The Manchester and Southport Railway Company*, 19 Be. 365. And see *Frewen* v. *Frewen*, L. R. 10 Ch. 610; and Sugd. R. P. Stat. 360. A notice to treat does not effect a conversion, *Haynes* v. *Haynes*, 1 Dr. & S. 426; 30 L. J. Ch. 578. But the devisee is entitled to the rents which accrue between the testator's death and the completion of the purchase, *Watts* v. *Watts*, L. R. 17 Eq. 217; 43 L. J. (N.S.) Ch. 77.

And where the title deeds were deposited as security for unpaid purchase-money.

Compulsory sale.

Option to purchase after testator's death.

It is not infrequent to find, in leases of freehold property, a clause which gives the lessee an option to purchase the demised property, either pending the term, or within a shorter fixed period. If the lessee exercises his option during the life of the lessor, of course the purchase-money goes, on the death of the lessor, testate or intestate, to his personal representatives. And if the option is exercised after the death of the lessor, and the lessor dies intestate, or has only generally devised his real estate, the purchase-money still goes to the personal representatives of the lessor, and not to his heir or devisee, *Lawes* v. *Bennett*, 1 Cox, 167; *Townley* v. *Bedwell*, 14 Ves. 591; *Weeding* v. *Weeding*, 1 J. & H. 424. See also *Collingwood* v. *Row*, 5 W. R. 484; 26 L. J. (N.S.) Ch. 649; *Goold* v. *Teague*, 7 W. R. 84; *Knollys* v. *Shepherd*, cited 1 J. & W. 499; *Wright* v. *Rose*, 2 S. & S. 323; 25 R. R. 209; *Re Isaacs*, [1894]

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3 Ch. 506 (intestacy); 63 L. J. Ch. 815. But if the lessor, by will made after the contract giving the option to purchase, specifically devises the property without referring to the contract, then the purchase-money will go to the devisee, *Drant* v. *Vause*, 1 Y. & C. 580; 11 L. J. Ch. 170; *Emuss* v. *Smith*, 2 De G. & S. 722; *Re Pyle*, [1895] 1 Ch. 724; 64 L. J. Ch. 477 (in which last-mentioned case the will was made on the same day as the lease giving the option of purchase was executed).

But, in the case above considered, the rents accruing due in the interval between the lessor's death and the exercise by the lessee of his option to purchase belong to the heir or devisee, *Townley* v. *Bedwell*, 14 Ves. 591. See also *Shadforth* v. *Temple*, 10 Sim. 184; *Lumsden* v. *Fraser*, 12 Sim. 263; *Ex parte Walker*, 1 Drew. 508; *Ex parte Hardy*, 30 Be. 206; *Re Marlay*, [1915] 2 Ch. 264; 84 L. J. Ch. 706.

Where real estate was devised to the testator's nieces, with power to W. to compel them to put him into possession thereof on payment to them of £10,000, and W. did so, legacy duty was held payable on the £10,000, *Att.-Gen.* v. *Wyndham*, 1 H. & C. 563; compare Jarm. Wills, 79; and see also as to options to purchase or rights of pre-emption, *Pegg* v. *Wisden*, 16 Be. 239; *Brooke* v. *Garrod*, 2 De G. & J. 62; 27 L. J. Ch. 226; *Re Cant's Estate*, 4 De G. & J. 503; 28 L. J. Ch. 641; *Woods* v. *Hyde*, 10 W. R. 339; 31 L. J. (N.S.) Ch. 295; *Evans* v. *Stratford*, 2 H. & M. 142; *Lord Ranelagh* v. *Melton*, 2 Dr. & S. 278; 34 L. J. Ch. 224; *Weston* v. *Collins*, 5 N. R. 345; 34 L. J. (N.S.) Ch. 353; *Moss* v. *Barton*, 35 Be. 197; *Buckland* v. *Papillon*, *ib.* 281; *Hale* v. *Bushill*, *ib.* 343; *Highgate Archway Company* v. *Jeakes*, L. R. 12 Eq. 9; 40 L. J. Ch. 408; *Ward* v. *Wolverhampton Waterworks Company*, L. R. 13 Eq. 243; 41 L. J. Ch. 408; *Re Wilson*, [1908] 1 Ch. 839; 77 L. J. Ch. 564.

Gale v. *Gale.*

Real estate was conveyed to trustees upon trust for A. for life, with remainder for such persons as A. should by deed or will appoint, and, in default, for the children of five persons named. The trustees were empowered, with the consent of A., to sell the settled property, and invest the proceeds in other real estate to be settled to the same uses. A., in exercise of his power, by will dated in 1846, appointed the settled estate to trustees upon trust to sell and to pay the proceeds to the children of B., and he devised all other his real estate, not thereinbefore specifically disposed of, to his wife. In 1849 the trustees of the settlement, with A.'s consent, sold the settled estate; but on the death of A., which took place in 1850, the purchaser's conveyance was not executed by one of the trustees, and the purchase-money was unpaid. It was held that there was an ademption, that the appointment by the will of A. had no effect, either on the new estate to be purchased with the produce of the settled estate or on the purchase-money which stood in its place; and that the widow and residuary legatee of A. was entitled to the purchase-money of the settled estate, *Gale* v. *Gale*, 21 Be. 349. This decision has been criticised, but was followed in *Blake* v. *Blake*, 15 Ch. D. 481; 49 L. J. Ch. 393. See *Re Dowsett*, [1901] 1 Ch. 398; 70 L. J. Ch. 149; and *Re Moses*, [1902] 1 Ch. 100; 71 L. J. Ch. 101; [1903] A. C. 13.

Railway shares converted into stock.

A bequest of railway shares generally includes railway stocks, *Morrice* v. *Aylmer*, L. R. 7 H. L. 717; 45 L. J. Ch. 614, overruling *Oakes* v. *Oakes*, 9 Ha. 666. See also *Re Pilkington's Trusts*, 6 N. R. 246. But debentures converted into debenture stock did not pass under a gift of "all my debentures," *Luard* v. *Lane*, 14 Ch. D. 856; 49 L. J.

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Ch. 768. Debenture stock passed under a bequest of "shares," the testatrix having no shares, in *Re Weeding*, [1896] 2 Ch. 364; 65 L. J. Ch. 743. See also *Re Herring*, [1908] 2 Ch. 493; 77 L. J. Ch. 665; *Re Macartney*, 64 S. J. 409.

WILL SPEAKS, FROM WHAT PERIOD.

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A will to speak from the death of the testator.

XXIV. And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*a*).

Will speaks from death, as to property only.

(*a*) This section makes a will speak, with reference to the property comprised in it, *i.e.* with reference to any gift contained in the will, *Gibson* v. *Gibson*, 1 Drew. 42, 61, 62; 22 L. J. Ch. 346; including property appointed, *Freme* v. *Clement*, 18 Ch. D. 499, 509; 50 L. J. Ch. 801; and only as to the property comprised in it, as from the death of the testator; it does not extend to the testator's capacity, so as to render valid a will executed during minority of a testator who died after attaining majority (see note to sect. 7); or so as to make the will, executed before the Married Women's Property Act, 1893, during coverture, of a testatrix who dies a widow, effective to pass property acquired by her after coverture, *Willock* v. *Noble*, L. R. 7 H. L. 580; 44 L. J. Ch. 345; *Re Price*, 28 Ch. D. 709; 54 L. J. Ch. 509; nor does sect. 24 extend to the objects of the testator's bounty, *Re Whorwood*, 34 Ch. D. 446; 56 L. J. Ch. 340; *Amyot* v. *Dwarris*, [1904] A. C. 268. Where a sum of money was bequeathed to trustees, upon trust for A. for life or until her marriage, and A., who was a widow at the date of the will, married again in the testator's lifetime, and the testator died without re-executing his will, it was held that A. was not entitled to any interest under the will, *Bullock* v. *Bennett*, 7 D. M. & G. 283; 24 L. J. (N.S.) Ch. 512. In *Lloyd* v. *Davies*, 15 C. B. 76, a devise to three daughters as tenants in common was to be varied on the marriage of any one of them; it was held that the marriage contemplated was a marriage in the testator's lifetime, or at all events within twelve months after his death; and that, in the event of no marriage taking place within that time, the proposed variation would not take effect. It would seem, also, that sect. 24 is not applicable to the construction of a clause excepting property from the operation of the will, see *Hughes* v. *Jones*, 1 H. & M. 765; 32 L. J. (N.S.) Ch. 487.

Contrary intention.

But, so far as the property comprised in or which passes by the will is concerned, to exclude the application of this section, the "contrary intention" must appear on the will, and must have a continuing operation down to the death of the testator. The will must be taken as if executed immediately before the death, and when so taken must show a "contrary intention," *Thomas* v. *Jones*, 1 D. J. & S. 63, 83; 32 L. J. Ch. 139. See also *Re Gillins*, [1909] 1 Ch. 345; 78 L. J. Ch. 244.

Estate of which "I am now seised."

But a devise of all the real estate of which "I am now seised," notwithstanding this section, has been held to pass only the real estates belonging to the testator at the date of his will, and not any subsequently acquired estates, *Cole* v. *Scott*, 1 M'N. & G. 518; 19 L. J. Ch. 63; *Hutchinson* v. *Barrow*, 6 H. & N. 583; 30 L. J. Ex. 280; *Williams* v.

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Owen, 2 N. R. 585; *Cave* v. *Harris*, 57 L. J Ch. 62. But see *Hepburn* v. *Skirving*, 4 Jur. (N.S.) 651; *Re Horton*, [1920] 2 Ch. 1.

"All my Quendon Hall estates."

A devise of "all my Quendon Hall estates in Essex" in a will of 1844 was held not to pass small additions to what were clearly comprised in the devise, which additions were acquired by the testatrix after the date of her will, although she had contracted to purchase some of them before that date, *Webb* v. *Byng*, 1 K. & J. 580. But the term "Quendon Hall estates" was not a recognised appellation of any particular property, and extrinsic evidence was admitted to show what the testatrix understood to be comprised in that arbitrary designation. But see *Re Otley and Ilkley Railway*, 34 Be. 525; 34 L. J. Ch. 496; *Wagstaff* v. *Wagstaff*, L. R. 8 Eq. 229; 38 L. J. Ch. 528; *Castle* v. *Fox*, L. R. 11 Eq. 542; 40 L. J. Ch. 302 (disapproving *Cole* v. *Scott*); *Re Ord*, 12 Ch. D. 22 (not so disapproving); *Re Portal and Lamb*, 30 Ch. D. 50; 54 L. J. Ch. 1012; Dart, V. & P. 308; and *Re Willis*, [1911] 2 Ch. 563; 81 L. J. Ch. 8.

Estate of which "I am seised."

By a will dated in 1835, the testator devised "all the freehold lands and hereditaments of or to which I or any person in trust for me am, is, or are seised"; by a codicil of 1845 the testator devised all the lands comprised in and devised by his said will to uses; real estate acquired by the testator after the date of the codicil was held to pass by the will and codicil, *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391; 26 L. J. Ch. 27; see also *Doe* v. *Walker*, 12 M. & W. 591; *Lord Lilford* v. *Powys-Keck*, 30 Be. 300; *Jepson* v. *Key*, 2 H. & C. 873.

In *Re Champion*, [1893] 1 Ch. 101; 62 L. J. Ch. 372, a testator by his will made in April, 1873, devised a freehold cottage with all the land thereto belonging, described as "now in my own occupation," to trustees upon certain trusts. In September, 1873, the testator purchased two fields adjoining the cottage and occupied them with the cottage until his death. In 1877 he made a codicil by which he confirmed his will. It was held that the two fields purchased in September, 1873, passed under the devise. The republication of the will by the codicil left no room for doubt, but North, J., held that the after-acquired fields would have passed by the will if there had been no republication by the codicil.

As to republication of a will by a codicil, see also *Barnes* v. *Crowe*, 1 Ves. 486; *Re Smith*, 45 Ch. D. 632; 60 L. J. Ch. 57; and compare *Re Hardyman*, [1925] 1 Ch. 287.

"My estate and effects."

In *O'Toole* v. *Browne*, 3 E. & B. 572; 23 L. J. Q. B. 282, a residuary gift to executors, upon trust to sell and invest the proceeds on security, in which the words "my estate and effects" were used in connection with words applicable to personalty, was held to pass after-acquired real estate; and a like decision was given in similar circumstances in *Stokes* v. *Salomons*, 9 Ha. 75; 20 L. J. Ch. 343; see also *Dobson* v. *Bowness*, L. R. 5 Eq. 404; 37 L. J. Ch. 309.

Leaseholds.

After-acquired leaseholds pass under a bequest of "all my leasehold tenements," and not under the residuary bequest, *Lady Langdale* v. *Briggs*, *supra*; *Re Ord*, 12 Ch. D. 22.

"My new 3¼ per cent. annuities."

A gift of "my new three and a quarter per cent. annuities" was held to comprise all the new three and a quarter per cent. annuities which the testator had at his death, *Goodlad* v. *Burnett*, 1 K. & J. 341. In that case V.-C. Wood illustrated this section thus: "If I refer to a particular thing, *e.g.* a ring, or a horse, and bequeath it as 'my ring' or 'my horse,' it would seem that the contrary intention to which the 24th section refers, 'appears by the will,' and the will speaks

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from the date of its execution; but when a bequest is of that which is generic, of that which may be increased or diminished, the Act requires something more on the face of the will, for the purpose of indicating such 'contrary intention,' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" See also *Douglas* v. *Douglas*, Kay, 400; 23 L. J. Ch. 732; *Trinder* v. *Trinder*, L. R. 1 Eq. 695; *Re Gibson*, L. R. 2 Eq. 669; 35 L. J. Ch. 596; *Re Slater*, [1907] 1 Ch. 665; 76 L. J. Ch. 472; *Re Jameson*, [1908] 2 Ch. 111; 77 L. J. Ch. 729; *Re Evans*, [1909] 1 Ch. 784; 78 L. J. Ch. 441; *Re Greenberry*, 55 S. J. 633; *Re Faris*, [1911] 1 Ir. R. 165; *Re Clifford*, [1912] 1 Ch. 29; 81 L. J. Ch. 220; *Re Leeming*, [1912] 1 Ch. 828; 81 L. J. Ch. 453; *Re Atlay*, 56 S. J. 444; *Re Willcocks*, [1921] 2 Ch. 327; 91 L. J. Ch. 27; *Re Hawkins*, [1922] 2 Ch. 569; 91 L. J. Ch. 486; *Re Ionides*, 66 S. J. 315; *Kuypers* v. *Kuypers*, [1925] 1 Ch. 244; *Re Davies*, [1925] 1 Ch. 642.

"All the moneys I possess in the A. bank."

And a gift of all the moneys "I possess in the A. bank, or in the company's funds," will pass all the moneys answering those descriptions at the death of the testator, *Hepburn* v. *Skirving*, 4 Jur. (N.S.) 651.

All the interest in mortgaged property.

A gift of all the interest and claim of the testator on household property at P., of which the testator was mortgagee, will pass arrears of interest owing at the testator's death as well as the principal, *Gibbon* v. *Gibbon*, 13 C. B. 205; 22 L. J. C. P. 131.

Exoneration from claims for money charged on estates in Scotland.

Exoneration "from all claims in respect of moneys laid out by me in improvements of the estates in Scotland, and which money has according to the laws of Scotland been charged thereon," was held to apply only to moneys charged at the date of the will, and not to money afterwards laid out and charged, nor even to money then laid out, but afterwards charged, *Douglas* v. *Douglas*, Kay, 400; 23 L. J. Ch. 732. But a release of debts in general terms is a gift of personal estate to which the section applies, *Everett* v. *Everett*, 7 Ch. D. 428; 47 L. J. Ch. 367, with which compare *Sidney* v. *Sidney*, L. R. 17 Eq. 65; 43 L. J. Ch. 15.

Will exercising power.

In each of the cases, *Price* v. *Parker*, 16 Sim. 198; 17 L. J. Ch. 398; and *Trimmell* v. *Fell*, 16 Be. 537; 22 L. J. Ch. 954, the will of a married woman, which was invalid on its execution, from not being within the terms of the power under which the will purported to be made, was not construed as if executed immediately before the testatrix's death, at which period the execution would have been valid. So, where a fund was limited in trust for such of the children of a marriage as the husband and wife should jointly appoint, and, in default of joint appointment, then as the survivor at any time or times "after the decease of the other" should by deed or will appoint, the power was not exercised by the will of the husband made in the lifetime of the wife, though he in the event was the survivor, *Cave* v. *Cave*, 8 D. M. & G. 131; *Re Blackburn*, 43 Ch. D. 75; 59 L. J. Ch. 208.

A power of appointment "during coverture by will" was held well exercised by the will executed during coverture of a lady who died discovert in *Re Illingworth*, [1909] 2 Ch. 297; 78 L. J. Ch. 701; *Re Safford's Settlement*, [1915] 2 Ch. 211; 84 L. J. Ch. 766.

General power over equitable estate, given to the survivor of two persons.

But if the time for the exercise of the power be not expressly defined, it would seem that a general power of appointment over an equitable estate, given to the survivor of two persons, to be executed by deed or will, would be executed by a will made during the lives of both the persons by the one who in the event proved to be the survivor, Sugd. R. P. Stat. 379. Such a general power, which may be used for the benefit of the person entitled to exercise it, is equivalent to ownership,

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and is in fact a right of exercising ownership which will certainly belong to one of two persons, though it is for the moment uncertain in which of those two it will actually become vested. A power to the survivor of two persons to declare a trust for his own benefit is not to be distinguished in principle from a trust for the benefit of the survivor; the one is a contingent trust, the other a contingent power; and as in equity a contingent interest is alienable by will, it would seem there is nothing to prevent a person who has a contingent right to appoint an estate for his own benefit from exercising that power subject to the contingency, or to prevent the instrument so executed from becoming a valid execution of the power so soon as the contingency happens. It is not necessary that the authority should exist at the time of execution of the will if it be afterwards acquired and be subsisting at the death of the testator; in such case the will is entitled to the benefit of the more liberal rule of interpretation provided by the 24th section of the Act. It must be borne in mind that this applies only to general powers affecting equitable estates. Thus, where a general equitable power of appointment over real estate was given to the survivor of A. and B., and A., who was a married woman, but under her marriage settlement possessed testamentary capacity, made her will in 1838, in the lifetime of B., and B. afterwards died in the lifetime of A., who did not re-execute her will, it was held that a general devise of real estate contained in the will of A. was (by sect. 24) to be taken as if it had been executed immediately before the death of A., and was (by sect. 27) a good execution of the power given to the survivor of A. and B., *Thomas* v. *Jones*, 1 D. J. & S. 63; 33 L. J. Ch. 139. Compare the notes to sect. 8, and to sect. 27.

Special power.

It is doubtful whether a special power of appointment by will can be well executed by a will dated before the creation of the power by virtue of this section. See *Re Hayes*, [1900] 2 Ch. 332; [1901] 2 Ch. 529; 70 L. J. Ch. 770; and see Solicitors' Journal, vol. 53, p. 240; Jarm. Wills, 833, 834; Hawkins' Constr. Wills, 22 *et seq.*

Leaseholds.

A specific gift of leaseholds for all the residue of the term therein of the testator was held to pass the fee which was acquired by the testator between the date of his will and the day of his death, *Struthers* v. *Struthers*, 5 W. R. 809; *Miles* v. *Miles*, L. R. 1 Eq. 462; *Cox* v. *Bennett*, L. R. 6 Eq. 422; *Saxton* v. *Saxton*, 13 Ch. D. 359. But if the intention to be gathered from the will, taken as a whole, is clearly to deal only with leaseholds, then subsequently acquired real estate will not pass, *Pierce* v. *Att.-Gen.*, *Pierce* v. *Harrison*, 3 W. R. 612; and a devise to B. of all a testator's freehold estates which he purchased of C. will not include a small piece of leasehold mixed up and held with the freehold, of which leasehold the testator purchased from another person the reversion in fee after the date of the devise, *Emuss* v. *Smith*, 2 De G. & S. 722; see Sugd. R. P. Stat. 365. A lessee for years assigned the term by way of mortgage to the immediate reversioner, who devised by the description of "my freehold houses in S. Street," and was at his death in possession as mortgagee; the mortgage debt did not pass under the devise, but formed part of the testator's personal estate, *Bowen* v. *Barlow*, L. R. 8 Ch. 171; 42 L. J. Ch. 82.

A testator gave the lease of the house in which he should be living at the time of his decease to his wife. At the date of the will he was living in a house which he held on lease for a short term. He subsequently bought and went to reside at a freehold house, where he died.

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Held, that the freehold house did not pass to the testator's widow, *Re Knight*, 34 Ch. D. 518; 56 L. J. Ch. 770.

In *Wheeler* v. *Thomas*, 7 Jur. (N.S.) 599, the will of a testator, who after the date thereof became lunatic, was held to speak as from its date and not from the death of the testator.

See also *Wedgwood* v. *Denton*, L. R. 12 Eq. 290; *Morgan* v. *Thomas*, 6 Ch. D. 176; and notes to sects. 26, 27, 33.

Residuary devise remains specific.

For the purposes of the rules of administration as to the order in which assets are to be applied in payment of debts, the specific character of a residuary devise is not altered by this section, *Hensman* v. *Fryer*, L. R. 3 Ch. 420; 37 L. J. Ch. 97; *Gibbins* v. *Eyden*, L. R. 7 Eq. 371; 38 L. J. Ch. 377; *Jackson* v. *Pease*, L. R. 19 Eq. 96; *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136; 44 L. J. Ch. 203; Jarm. Wills, 2027. See also note (*zz*), p. 1243, *ibid.* And legacies which before would have been specific remain specific, *Bothamley* v. *Sherson*, L. R. 20 Eq. 304; 44 L. J. Ch. 589.

Distinction between specific and general legacies.

The distinction between a specific and a general bequest is important. Thus, the bequest of a debt, or a sum of money or stock, or a watch, ascertained and distinguished from the mass of the personal estate—as a bequest of £500 now due to me from A., or £500 now in my desk, or £500 Consols now standing in my name, or the watch which I now wear—is a specific legacy; but a bequest of money or value merely, as, of £500 sterling, or £500 Consols, or a gold watch, is a pecuniary or general legacy. In *Mytton* v. *Mytton*, L. R. 19 Eq. 30; 44 L. J. Ch. 18, a legacy of "the sum of £3,000 invested in Indian securities" was held not to be specific; and see *Re Nottage*, [1895] 2 Ch. 649; 64 L. J. Ch. 695. But see *Re Pratt*, [1894] 1 Ch. 491; 63 L. J. Ch. 484, where a legacy of "£800 invested in 2½ Consols" was held specific. A definition of a specific legacy will be found in *Bothamley* v. *Sherson*, *ubi sup.*, explained in *Re Ovey*, 20 Ch. D. 676; 51 L. J. Ch. 665; affirmed, *sub nomine Robertson* v. *Broadbent*, 8 App. Cas. 812; 53 L. J. Ch. 266. The specific legatee, who (subject, of course, to the paramount claims of creditors) can at once fasten upon the particular thing, as being identified and appropriated by the testator himself, is preferred to the general legatee, who can only claim satisfaction in amount or value out of the personal estate at large. It follows that, if the specific thing be gone before the gift takes effect, the specific bequest must, from its very nature, wholly fail: while the general legacy will be paid in full, abate, or fail, according to the adequacy or inadequacy of the general assets. See on this subject, *Re Dowsett*, [1901] 1 Ch. 398; 70 L. J. Ch. 149; *Re Vickers*, 81 L. T. 719; *Re Moses*, [1902] 1 Ch. 100; 71 L. J. Ch. 101; [1903] A. C. 13.

By the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3, "Section 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband." See note to sect. 8, *ante*

LAPSED AND VOID DEVISES.

Sect. 25.

What a residuary

XXV. And be it further enacted, That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in

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devise shall include.

any devise in such will contained, which shall fail or be void by reason of the death of the devisee (*a*) in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect (*b*), shall be included in the residuary devise (if any) contained in such will (*c*).

(*a*) A testator, in exercise of a general power, appointed real estate to A., in trust for B.; A. survived the testator, but B. died in his lifetime; the appointment took effect and excluded those claiming in default, and the trust for B. failing by his death, the appointee is a trustee for the residuary devisee, or if none, for the heir-at-law of the appointor, *Re Van Hagan*, 16 Ch. D. 18; 50 L. J. Ch. 1; *Coxen* v. *Rowland*, [1894] 1 Ch. 406; 63 L. J. Ch. 179; with which compare *Re Boyd*, [1897] 2 Ch. 232; 66 L. J. Ch. 614, in which case it was held that the testatrix had not indicated a sufficient intention to make the appointed fund her own for all purposes. See also *Re Marten*, [1902] 1 Ch. 314; 71 L. J. Ch. 203.

Disclaimer.

(*b*) It is presumed that a devise which fails by reason of the disclaimer of the devisee is a devise which is "incapable of taking effect," within the meaning of the Act. See Jarm. Wills, 949.

On what principle sect. 25 is to be construed.

(*c*) This section is to be construed on the principle of assimilating a residuary devise of real estate to a like bequest of personalty, *Carter* v. *Haswell*, 3 Jur. (N.S.) 788; 26 L. J. Ch. 576. And see Sugd. R. P. Stat. 373. But the Act does not alter the specific nature of a residuary devise, *ante*, p. 54.

Evidence of contrary intention.

Where estate X. was devised to B. in fee, and there was a residuary devise of "all my freehold hereditaments not hereinbefore devised," to the same person, B. for life, with remainders over, and B. died in testator's lifetime, it was held that there was no "contrary intention" within the meaning of this section, and that the residuary devise included estate X., *Green* v. *Dunn*, 20 Be. 6; 24 L. J. Ch. 577; and a devise of "all other real estate of which I may die possessed," is a residuary devise within this section, and will include an estate comprised in a specific devise which has lapsed on account of the death of the specific devisee in the testator's lifetime, *Cogswell* v. *Armstrong*, 2 K. & J. 227; see also *Bernard* v. *Minshull*, Joh. 276; 28 L. J. Ch. 549, the case of a married woman having a testamentary power of appointment. Where, by mistake, there was a specific devise to uses which, being non-existent, were incapable of taking effect, the specifically devised estate was held to be included in the residuary devise, *Culsha* v. *Cheese*, 7 Ha. 236; 16 L. J. Ch. 269; see Sugd. R. P. Stat. 373; and the decision was the same in the case of a void trust in favour of a charity, *Carter* v. *Haswell*, *ubi sup.* *Baden* v. *Bassett*, W. N. 1875, p. 5, is the other way; *sed qu.* See further as to the construction to be put upon the words "not hereinbefore disposed of," *Earl of Hardwicke* v. *Douglas*, 7 C. & F. 795; *Re Stoodley*, [1916] 1 Ch. 242; 85 L. J. Ch. 226. And see Prec. 33, note (*a*).

Exercise of power of appointment.

But in order that the section may apply, there must be a residuary devise, and not merely a devise of a particular residue. Thus, where a married woman, having a general power to appoint by will estates A. and B., devised estate A. to her husband for life, and subject thereto to trustees upon the trusts after mentioned, and then devised "all other the hereditaments comprised in the settlement not hereinbefore disposed of" to another person, the trusts of estate A being to sell, pay certain legacies, and dispose of the residue for charitable purposes; the devise of

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"all other the hereditaments, &c." was specific, and not a residuary devise; consequently the 25th section did not apply, and the void gifts to the charities did not pass, but devolved as in default of appointment, *Re Brown*, 1 K. & J. 522. So, where a testatrix gave certain freeholds in the parish of H. to A. upon certain trusts which were declared void, and devised to B. the rest of her freeholds in the parish of H. and all her freeholds in certain other parishes, the lands given to A. did not pass under the devise to B., but were undisposed of, *Springett* v. *Jenings*, L. R. 6 Ch. 333; 40 L. J. Ch. 348. But the section does not require that the residuary devise shall include all the testator's real estate of every tenure, *Mason* v. *Ogden*, [1903] A. C. 1; 72 L. J. Ch. 152.

Legacies to creditors, no lapse of.

A direction by will to pay the testator's debts, including the debts not paid in full proved under a bankruptcy, was held to be a bounty, not only in favour of the creditors who survived the testator, but also of the representatives of those who predeceased him, and there was no lapse, *Turner* v. *Martin*, 7 D. M. & G. 429; 26 L. J. Ch. 216. And a bequest in discharge of a moral obligation does not lapse by the death of the legatee in the testator's lifetime, *Stevens* v. *King*, [1904] 2 Ch. 30; 73 L. J. Ch. 535.

GENERAL DEVISE—COPYHOLDS, LEASEHOLDS.

Sect. 26.

What a general devise shall include.

XXVI. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will (*a*).

Wilson v. *Eden*.

Leaseholds.

(*a*) Where in the same will there was a gift of all the testator's personal estate to A., and a devise of all his manors, messuages, lands, tenements, and hereditaments in the counties of York and Durham, and all other his real estates, to B. and C. and their heirs, to uses, it was held by the Courts of Exchequer, *Wilson* v. *Eden*, 5 Ex. 752; 20 L. J. Ex. 73; and Queen's Bench, 18 Q. B. 474; and by Sir John Romilly, M.R., 16 Be. 153, that the testator's leaseholds for years passed to B. and C., being included in the devise of land described by reference to locality, and not to A. as part of the personal estate. In that case Lord Langdale, M.R., 11 Be. 237, thought that the words "other real estate" would include only that which technically was real estate, and therefore not leaseholds. The Court of Queen's Bench considered the words to be a distinct devise, and that they were not sufficient to cut down the meaning which, under sect. 26, must be imputed to the earlier words "lands . . . in the counties of York and Durham," which would include leaseholds situated there. Leaseholds were held not to pass under a general devise of "real estate" in *Turner* v. *Turner*, 21 L. J. Ch. 843; and in *Butler* v. *Butler*, 28 Ch. D. 66; 54 L. J. Ch. 197, Chitty, J., followed the view expressed by Lord Langdale, that leaseholds would not

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pass under a devise of real estate described generally. See also *Best* v. *Standeven* (1872), W. N. p. 44, and *Re Guyton and Rosenberg's Contract*, [1901] 2 Ch. 591; 70 L. J. Ch. 751. And where the word "freehold" is prefixed to a similar general description, the leasehold will not pass, *Stone* v. *Greening*, 13 Sim. 390. See, however, the observations on this case, *Re Bright-Smith*, 31 Ch. D. 314; 55 L. J. Ch. 365, in which copyhold parts of a farm were held to pass under the words "my freehold farm and lands situate at E. and now in the occupation of J. B." Where a testator who had no freehold estate, but had leaseholds for a long term of years, which he thought were freehold, charged an annuity on his real estate, the leaseholds were charged therewith, *Gully* v. *Davis*, L. R. 10 Eq. 562; 39 L. J. Ch. 684. As to what is sufficient indication of a contrary intention to exclude leaseholds from a devise of lands, see *Prescott* v. *Barker*, L. R. 9 Ch. 174; 43 L. J. Ch. 498. A direction to convert the personal estate "except leaseholds" will not exclude leaseholds from a devise of "real estate at, in, or near" a particular locality, where the leaseholds are at, in, or near the locality, *Moase* v. *White*, 3 Ch. D. 763. A devise of "all my property whether freehold or personal and wheresoever situate," passed copyholds, *Reeves* v. *Baker*, 18 Be. 372; 23 L. J. Ch. 599. But after the year 1925 all land of copyhold or customary tenure is enfranchised by virtue of sect. 128 of the Law of Property Act, 1922, and the Law of Property Act Postponement Act, 1924.

GENERAL DEVISE OR BEQUEST—APPOINTMENT.

Sect. 27.

What a general gift shall include.

XXVII. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper (*a*), and shall operate as an execution of such power, unless a contrary intention shall appear by the will (*b*); and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner (*c*), shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper (*d*), and shall operate as an execution of such power, unless a contrary intention shall appear by the will (*e*).

General power.

(*a*) These words refer to the extent of the power as regards the objects, and do not require that the mode in which the power is exercised should be unrestrained; a power is none the less within the meaning of the section because it is exercisable by will only, and not by deed or otherwise *inter vivos*, *Hawthorne* v. *Shedden*, 3 S. & G. 293; 25 L. J. Ch. 833; *Re Powell's Trusts*, 18 W. R. 228. But of course a power, though general in terms, which is exercisable by deed only, does not fall within the statute, *Moss* v. *Harter*, 2 S. & G. 458. If the power is to be

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exercised by the testator by a will expressly referring to the power, this does not amount to a power to appoint "in any manner" the testator may think proper, and if the will does not refer to the power, it will not operate as an execution of it, *Re Phillips*, 41 Ch. D. 417; 58 L. J. Ch. 448; *Phillips* v. *Cayley*, 43 Ch. D. 222; 59 L. J. Ch. 177, overruling *Re Marsh*, 38 Ch. D. 630; 57 L. J. Ch. 639. See also *Re Tarrant's Trusts*, 58 L. J. Ch. 780. And as to what in such cases may be a sufficient reference to the power, see *Re Lane*, [1908] 2 Ch. 581; 77 L. J. Ch. 774; In *Re Byron's Settlement*, [1891] 3 Ch. 474; 60 L. J. Ch. 807, a testatrix had a power to appoint freehold land to any person not being her present husband or any friend or relation of his. This was held not to be a power to appoint "in any manner she might think proper," and therefore a general devise in the will did not act as an execution of the power. As to a power of appointment contained in a will, and not expressly revoked by a codicil to the will, which declares the trusts of the will afresh, see *Re Wood*, 83 L. T. 157. As to what words are necessary for passing an entailed estate under the statutory power conferred by sect. 176 of the Law of Property Act, 1925, see that section in the notes to sect. 3 of the Wills Act, *ante*.

Contrast between old and present law, as to exercise of general power.

(*b*) Under the present law it is necessary to show a "contrary intention" to exclude the exercise of a general power by a general devise or bequest, whilst under the old law it was needful to show the intention to exercise the power; the appointees are therefore now in a more favourable position than under the old law, *Lake* v. *Currie*, 2 D. M. & G. 536, 548. There is no "contrary intention" within the meaning of the statute, unless the will contains something inconsistent with the view that the general devise or bequest was meant as an execution of the power, *Scriven* v. *Sandom*, 2 J. & H. 743; *Re Doherty-Waterhouse*, [1918] 2 Ch. 269. And to exclude the application of the 27th section, the "contrary intention" must have a continuing operation down to the death of the testator; the will must be taken as if executed immediately before the death, and when so taken must show on the face of it an intention of depriving the general devise of the effect given to it by the statute, *Thomas* v. *Jones*, 1 D. J. & S. 63, 83; 32 L. J. Ch. 139. As to what is sufficient evidence of a contrary intention, see *Pettinger* v. *Ambler*, L. R. 1 Eq. 510; 35 L. J. Ch. 389. It makes no difference whether the settlement creating the power was made by the testator himself or by a stranger, and it would seem that a codicil cannot be read with the will for the purpose of showing that a contrary intention appears by the will, *Re Clark's Estate*, 14 Ch. D. 422; 49 L. J. Ch. 586. The contrary intention must be found in the will containing the general bequest. Thus, a testator executed a "testamentary appointment" under a general power, and a month later executed a will containing a residuary bequest and not referring to the testamentary appointment. Although the Court considered—looking at both documents—that the testator had probably no intention of revoking the "testamentary appointment," and executing the general power by the bequest, still, it could not look beyond the will itself, and as no contrary intention appeared therein, the effect of sect. 27 and of the general bequest was to revoke the "testamentary appointment," and to execute the power, *Re Gibbes' Settlement*, 37 Ch. D. 143; 57 L. J. Ch. 757. See *Re Jarrett*, [1919] 1 Ch. 366.

As to date of instrument exercising a power.

A power may be exercised by a will bearing date before the instrument which creates the power, if that instrument comes into operation in the testator's lifetime, *Stillman* v. *Weedon*, 16 Sim. 26; 18 L. J. Ch. 46;

Cofield v. *Pollard*, 5 W. R. 774; *Patch* v. *Shore*, 2 Dr. & S. 589; 32 L. J. Ch. 185; *Boyes* v. *Cook*, 14 Ch. D. 53; 49 L. J. Ch. 350; *Airey* v. *Bower*, 12 App. Cas. 263; 56 L. J. Ch. 742. See also *Re Hernando*, 27 Ch. D. 284; 53 L. J. Ch. 865. Sect. 27.

A power to appoint by will during coverture is well exercised by a will made during coverture although coming into operation afterwards, *Re Illingworth*, [1909] 2 Ch. 297; 78 L. J. Ch. 701; *Re Safford's Settlement*, [1915] 2 Ch. 211; 84 L. J. Ch. 766.

The 27th section, however, applies only to powers actually created at the death of the testator, and does not enable a testator to execute an inchoate power of which he was the intended donee under the will of a person who survives him, *Jones* v. *Southall*, 32 L. J. Ch. 130. In the same case a lady who had gone through the ceremony of marriage with her deceased sister's husband, purported to make a will under a power created by a settlement executed prior to the void marriage; the will was held to be operative over the property, *Southall* v. *Jones*, 1 Sw. & Tr. 298; 28 L. J. P. 112.

General powers of appointment.

Under a settlement a testator had a power of appointment over estate B., but no such power over estate A.; by his will he confirmed the settlement, and devised generally all his real estate to uses different from those of the settlement; it was held that the will exercised the power and passed estate B., *Lake* v. *Currie*, 2 D. M. & G. 536. And where a testator, who under a settlement had a general power of appointment over certain leaseholds, made, for purposes different from those of the settlement, a general bequest, subject (as to such of his property as was comprised in the settlement) to that settlement which he thereby confirmed in all respects, this was held to be an exercise of the general power, notwithstanding the words confirming the settlement, *Hutchins* v. *Osborne*, 3 De G. & J. 142; 27 L. J. Ch. 421.

A testatrix (a widow), in the exercise of a power created by the will of S., appointed a sum of stock to Joseph and John and her other children equally; she appointed all the rest of the property coming to her under the will of S. to her children living at her death equally, and she constituted Joseph "her residuary legatee"; John died before her; it was held that the general residuary appointment passed John's share to Joseph: *Re Spooner's Trust*, 2 Sim. (N.S.) 129; 21 L. J. Ch. 151. See also *Bush* v. *Cowan*, 32 Be. 228; 9 L. J. (N.S.) Ch. 161; 4 Dav. Conv. 279.

A testamentary appointment of personalty, under a general power, to A. in trust for B., which trust fails by the death of B., in the lifetime of the testator, is a good appointment in favour of A., who holds as a trustee, not for the persons entitled in default of appointment, but on the same trusts as if the appointed fund had been the appointor's own property, *Chamberlain* v. *Hutchinson*, 22 Be. 444; *Brickenden* v. *Williams*, L. R. 7 Eq. 310; 38 L. J. Ch. 222; *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423; 39 L. J. Ch. 410. It is, however, a question of intention whether the testator meant to take the property entirely out of the instrument creating the power, *Re De Lusi's Trusts*, 3 Ir. L. R. 232; *Re Davies' Trusts*, L. R. 13 Eq. 163; 40 L. J. Ch. 566; *Re Pinède's Settlement*, 12 Ch. D. 667; 48 L. J. Ch. 741; *Hinsley* v. *Ickeringill*, 17 Ch. D. 151; 50 L. J. Ch. 364; *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238; 52 L. J. Ch. 331; *Re Thurston*, 32 Ch. D. 508; 55 L. J. Ch. 564. And see *Re Seabrook*, [1911] 1 Ch. 151; 80 L. J. Ch. 61. As to real estate, the exercise by the testator of a general power of appoint-

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ment caused the property appointed to vest in his personal representative under the Land Transfer Act, 1897, s. 1, in the same manner as if such property had belonged to the testator absolutely (s. 1, sub-s. (2)) And after 1925 such property will similarly vest in the personal representative by virtue of sects. 1 (1), and 3 (2) of the Administration of Estates Act, 1925.

Exercise of general powers by married women.

This section is applicable to married women having testamentary powers of appointment exercisable during coverture equally with persons *sui juris*, *Bernard* v. *Minshull*, Joh. 276; 28 L. J. Ch. 549. The execution of a general testamentary power by a married woman makes the appointed property liable for her debts and other liabilities in the same manner as her separate estate is made liable under the Married Women's Property Act, 1882 (s. 4); and see *Godfrey* v. *Harben*, 13 Ch. D. 216; 49 L. J. Ch. 3. Where a married woman, or other donee of a general power of appointment over personalty, makes an appointment by will and appoints an executor, the executor is entitled to receive the appointed fund, *Hayes* v. *Oatley*, L. R. 14 Eq. 1; 41 L J. Ch. 510; *Re Hoskin's Trusts*, 5 Ch. D. 229; 46 L. J. Ch. 274, and on appeal, 6 Ch. D. 281; 46 L. J. Ch. 817. But see *Re Thurston*, 32 Ch. D. 508; 55 L. J. Ch. 564.

General powers of appointment.

Special power.

As to the effect of an appointment to trustees for the objects of a special power, and the question as to whether the property can be transferred to such trustees, see *Busk* v. *Aldam*, L. R. 19 Eq. 16; 44 L. J. (N.S.) Ch. 119; *Re Mackenzie*, [1916] 1 Ch. 125; 85 L. J. Ch. 197; and the cases there cited, and *Re Mackenzie*, [1917] 2 Ch. 58; 86 L. J. Ch. 543.

A testatrix having a general power to appoint £10,000 secured by a term of years in freehold estates, and having also a general power of appointment over the estates so charged, by her will devised all her lands to A. for life, remainder to B. in tail, and she gave the residue of her personal estate to A.; it was held that the £10,000 passed under the residuary gift of the personalty, *Clifford* v. *Clifford*, 9 Ha. 675.

A general devise and bequest of "all my estate and effects real and personal which I may die possessed of or entitled to" has been held to exercise a general power given to the testatrix to appoint by will any sum or sums of money not exceeding a certain sum to be raised out of the estate of the donor of the power, *Re Jones*, 34 Ch. D. 65; 56 L. J. Ch. 58, distinguished in *Re Salvin*, [1906] 2 Ch. 459; 75 L. J. Ch. 825. And see *Re Wilkinson*, [1910] 2 Ch. 216; 79 L. J. Ch. 600.

A money bequest exercises *pro tanto* a general power over a sum of money.

In *Hawthorne* v. *Sheddon*, 3 S. & G. 293; 25 L. J. Ch. 833, general pecuniary legacies were held to be payable out of personal estate over which the testatrix had a general power of appointment, although in her will no particular fund was indicated, the assets of the testatrix not comprised in the power being insufficient to pay the legacies, see Sugd. Pow. 310; *Wilday* v. *Barnett*, L. R. 6 Eq. 193. In fact, a single bequest of pecuniary legacies operates as an execution *pro tanto* of a general testamentary power of appointment over a sum of money, *Re Wilkinson*, L. R. 4 Ch. 587.

A married woman having a general power over personalty worth a little more than £2,600, to the interest of which she was entitled for life, and having no other property except a reversionary interest contingent on her surviving her mother (which did not happen), gave £2,600 to her husband, and this was held to be a good exercise of the power independently of the statute, *Shelford* v. *Acland*, 23 Be. 10; 26 L. J. Ch. 144;

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and the bequest by a married woman of "the property which she might be possessed of or entitled to at her decease" was held to pass personal property over which she had only a general power of appointment, *Frankcombe* v. *Hayward*, 9 Jur. 344. That no reference to a general power is necessary in an instrument containing a general gift or devise, see further, *Harrington* v. *Harrington*, 13 Sim. 318; 13 L. J. Ch. 354; *Walker* v. *Banks*, 25 L. T. (o.s.) 267.

General powers of appointment.

Real estate was settled to the use of A. for life, with remainder to the use of such persons as A. should by will appoint, with power of sale and direction for re-investment in realty, and interim investment in Consols. The settled estate was sold and the proceeds invested in Consols; A. made a general bequest of all her personal estate; this operated as an execution of the power in the settlement and passed the Consols, which had been transferred to A., *Chandler* v. *Pocock*, 16 Ch. D. 648; 49 L. J. Ch. 442; and see *Re Harman*, [1894] 3 Ch. 607; 63 L. J. Ch. 822. But where, after the death of the testator, who has a power of appointment over the real estate, there still exists a tenant for life who has the right to call for the re-investment in land of the Consols representing the proceeds of the sale of the real estate, the Consols are looked upon as land, and will not pass under a general bequest of the testator's personal estate, *Re Greaves' Settlement Trusts*, 23 Ch. D. 313; 52 L. J. Ch. 753; and see *Re Duke of Cleveland's Settled Estates*, [1893] 3 Ch. 244; 62 L. J. Ch. 955; and *Re Gosselin*, [1906] 1 Ch. 120; 75 L. J. Ch. 88.

Special powers, sect. 27 does not apply to.

The 27th section does not apply to special or particular powers; but the old law applies, which is that the will must contain some indication, either by reference to the power or to the property subject to it, of an intention to exercise the special power, and anything showing that the testator had the power in his mind would be enough, see *Re Caplin*, 6 N. R. 17; *Russell* v. *Russell*, 12 Ir. Ch. Rep. 377; *Butler* v. *Gray*, L. R. 5 Ch. 26; 39 L. J. Ch. 291; *Evans* v. *Evans*, 23 Be. 1; 26 L. J. Ch. 193; *Re Swinburne*, 27 Ch. D. 696; 54 L. J. Ch. 229; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172; 55 L. J. Ch. 121; *Re Mills*, 34 Ch. D. 186; 56 L. J. Ch. 118; *Re Esther Williams*, 42 Ch. 93; 58 L. J. Ch. 451; *Re Cotton*, 40 Ch. D. 41; 58 L. J. Ch. 174; *Re Huddleston*, [1894] 3 Ch. 595; 64 L. J. Ch. 157. A testator making a mere general devise, though having no real estate of his own, does not thereby sufficiently indicate an intention of exercising a special power of appointing real estate, *Re Mills; Re Esther Williams, ubi sup.* And see *Re Hayes*, [1900] 2 Ch. 332; 69 L. J. Ch. 691; [1901] 2 Ch. 529.

Special power.

For the exercise of a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it; and either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose, *Re Ackerley*, [1913] 1 Ch. 510, 515; 82 L. J. Ch. 260; and compare *Re Weston's Settlement*, [1906] 2 Ch. at 624; 76 L. J. Ch. 54.

Where a father had power to appoint certain personalty amongst his children, his will, devising and bequeathing in general terms all his real and personal estate to a child, one of the objects of the power, was held to be inoperative as to such personalty, *Cloves* v. *Awdry*, 12 Be. 604; see also *Clogstoun* v. *Walcott*, 13 Sim. 523 (not followed in *Ferrier* v. *Jay, and Teape's Trusts, infra*); *Moss* v. *Harter*, 2 S. & G. 458; *Hope* v. *Hope*, 5 Gif. 13; *Ames* v. *Cadogan*, 12 Ch. D. 868; 48 L. J. Ch. 762.

Special power,

But in *Pidgely* v. *Pidgely*, 1 Col. 255; *Elliott* v. *Elliott*, 15 Sim. 321; 15 L. J. Ch. 393; *Cowx* v. *Foster*, 1 J. & H. 30; 29 L. J. Ch. 886;

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exercise of, in particular case.

Ferrier v. *Jay*, L. R. 10 Eq. 550; 39 L. J. Ch. 686; *Re Teape's Trusts*, L. R. 16 Eq. 442; 43 L. J. Ch. 87; *Thornton* v. *Thornton*, L. R. 20 Eq. 599, special powers were held to be exercised by general gifts to the objects of the powers. These decisions in no way depended upon the Wills Act, but turned upon the words of the particular wills affording evidence of intention to exercise *some* power, as well as to dispose of the testator's own property, as in *Re Wait*, 30 Ch. D. 617; 54 L. J. Ch. 1172. See also *Re Mayhew*, [1901] 1 Ch. 677; 70 L. J. Ch. 428; *Kent* v. *Kent*, [1902] P. 108; 71 L. J. P. 50; *Re Weston's Settlement*, [1906] 2 Ch. 620; 76 L. J. Ch. 54; *Re Sanderson* (1912), W. N. 54; and *Re Ackerley*, [1913] 1 Ch. 510; 82 L. J. Ch. 260.

A testator having power to charge an estate with £500 in favour of his younger children, and to limit a term for securing that sum, devised the estate, subject to legacies to his younger children to the amount of £500, but without limiting any term and without referring to his power; it was held that by the will the estate was well charged with the £500, *Davies* v. *Davies*, 28 L. J. Ch. 102.

Where a testator gave a power of appointment over a sum of £30,000, which sum increased in value to £39,000, and the donee of the power in her will recited the exact words used by the donor, and so purported to appoint £30,000 only, it was held that this was a valid appointment of the whole, and that the excess of £9,000 was divisible among the beneficiaries in proportion to their shares as directed by the will of the donee, *Re Cruddas*, [1900] 1 Ch. 730; 69 L. J. Ch. 355.

Power of revocation, exercise of.

A power of revocation is not exercised by an instrument of appointment referring generally to and expressed to be in exercise of every power enabling the appointor, provided there is other property to which the appointment can apply, *Pomfret* v. *Perring*, 5 D. M. & G. 775; 24 L. J. Ch. 187.

When a general power of appointment of real estate by deed or will has been completely exercised by deed, a power of revocation and new appointment being at the same time reserved, a general devise of real estate by the subsequent will of the donee of the power will not *per se* (that is without anything being done to displace the first appointment) amount, by virtue of sect. 27, to an exercise of the power of revocation and new appointment, *Charles* v. *Burke*, 43 Ch. D. 223, n.; *Re Brace*, [1891] 2 Ch. 671; 60 L. J. Ch. 505. See also *In b. Merritt*, 1 Sw. & Tr. 112; 29 L. J. P. 155; and *Re Gibbes' Settlement*, *ante*, p. 58; and the note to sect. 20, *ante*, p. 36; and as to the 27th section generally, Hawkins, Constr. Wills, Chapter II.; and as to the exercise of powers by persons domiciled abroad, see *post*, Appendix on Domicile, p. 413.

(*c*) A bequest of "all stocks, shares and securities which I possess or to which I am entitled" is a bequest which under this section will pass stocks which the testator has merely power to appoint, *Re Jacob*, [1907] 1 Ch. 445; 76 L. J. Ch. 217.

(*d*) See note (*a*) to this section, *ante*, p. 57.

(*e*) See note (*b*) to this section, *ante*, p. 58.

FEE SIMPLE WITHOUT WORDS OF LIMITATION.

Sect. 28.

How a devise without words of limitation

XXVIII. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had

power to dispose of by will in such real estate, unless a contrary intention shall appear by the will (*a*).

Sect. 28. shall be construed.

(*a*) This section applies to a devise of an existing estate or interest, and not to an estate or interest which the testator creates *de novo* by his will; and therefore a gift of an annuity without words of limitation is held, as it would have been before the statute, to be a gift for life only, though the annuity is charged on real estate, *Yates* v. *Maddan*, 3 M'N. & G. 532; 21 L. J. Ch. 24; *Lett* v. *Randall*, 3 S. & G. 83; 30 L. J. Ch. 110; affirmed, 9 W. R. 130; *Nichols* v. *Hawkes*, 10 Ha. 342; 22 L. J. Ch. 255. See also *Reay* v. *Rawlinson*, 29 Be. 88; 30 L. J. Ch. 330.

A devise of freeholds to "A. to be kept in trust for B.; that is, A. is to let the premises, and give the rent to my son B. for his support," passed the freehold to B. absolutely, *Malcolmson* v. *Malcolmson*, 17 L. T. (o.s.) 44. And as before the Act a devise of rents and profits passed an estate for life, such a devise will now, by force of this section, give an estate in fee simple, *Mannox* v. *Greener*, L. R. 14 Eq. 456.

Gift of income, construction of, in particular case.

Though generally a gift of the income of a fund carries the corpus as well as the income when the corpus is otherwise undisposed of, *Clough* v. *Wynne*, 2 Mad. 188; *Humphrey* v. *Humphrey*, 1 Sim (N.S.) 536; 20 L. J. Ch. 425, it was held that, under a bequest of a residue upon trust to pay the dividends of £1,500 stock to A. for life, and after her death to divide the dividends "equally between B. and C. and the survivor of them," the survivor took only a life interest. *Blann* v. *Bell*, 2 D. M. & G. 775; 22 L. J. Ch. 236. See also *Wetherell* v. *Wetherell*, 1 D. J. & S. 134; 32 L. J. Ch. 476.

Devise without words of limitation.

The presence of words of inheritance in other parts of a will does not, with reference to a particular devise from which such words are absent, manifest such a "contrary intention" within the meaning of this section as to cut down the particular devise to an estate for life, *Wisden* v. *Wisden*, 2 S. & G. 396, 405.

The section does not apply to a devise with any words of limitation which, if inserted, must operate by their own force. It is immaterial whether the devise is of an estate vested in the testator, or is in execution of a power vested in him. And the Act is equally applicable to a power created by will, and would, just as in a devise of an estate, supply words of limitation so as to enable the donee of the power to appoint the fee simple, Sugd. R. P. Stat. 382.

It has not yet been decided whether this section would apply to a case where, after a devise without words of limitation, there is a devise over also without words of limitation. Lord St. Leonards was of opinion that such cases were not within the purview of the Act, and that it would be dangerous to extend it to them, Sugd. R. P. Stat. 382. And see *Gravenor* v. *Watkins*, L. R. 6 C. P. 500; 40 L. J. (N.S.) C. P. 197.

WORDS IMPORTING FAILURE OF ISSUE.

Sect. 29. How the words "die without issue," or

XXIX. And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any

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"die without leaving issue," shall be construed.

person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue (*a*), unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Dying without issue.

(*a*) The object of this section is to remedy the inconvenience arising from the words "dying without issue," and similar words having acquired a legal meaning different from the popular meaning. *Greenway* v. *Greenway*, 2 D. F. & J. 128; 29 L. J. Ch. 601. And mere presumption of intention is insufficient to exclude the operation of this section, *Re Mid-Kent Railway Company*, 1 N. R. 470.

In a devise or bequest to A., but if A. dies in the lifetime of B. without leaving issue, then over, the words "without leaving issue" refer to the time of the death of B., and notwithstanding that A. left issue living at his death, the gift over will take effect, if all the issue of A. die in the lifetime of B., *Crowder* v. *Stone*, 3 Russ. 217; 7 L. J. (o.s.) Ch. 93; *Jarman* v. *Vye*, L. R. 2 Eq. 784; 35 L. J. Ch. 821. In *Re Booth*, [1900] 1 Ch. 768; 69 L. J. Ch. 474, it was held that the words "die without child or children" meant "die without leaving child or children." See also *Barkworth* v. *Barkworth*, 75 L. J. Ch. 754; *Dunn* v. *Morgan*, 84 L. J. Ch. 812.

The Conveyancing Act, 1882, s. 10, made void an executory limitation as soon as there was living any issue who had attained twenty-one of the class on default whereof the limitation over was to take effect.

The Law of Property Act, 1925, s. 134, makes an executory limitation over on default or failure of all or any of the issue of a person entitled to (a) an equitable interest in land for an estate in fee simple or for any less interest not being an entailed estate; (b) any interest in other property, not being an entailed interest, void on any issue attaining twenty-one. See the section set out, *post*, p. 263.

In a gift over in a will upon death "without leaving any child or children," it is a well settled rule of construction that these words will be construed "without having had any child who has attained a vested interest" under the previous gift. And it makes no difference in the application of this rule of construction that the testator knew at the date of the will that the person on whose death the gift over is made in fact had a child then living, *Re Cobbold*, [1903] 2 Ch. 299; 72 L. J. Ch. 588, as corrected by the *errata* in that volume. And see *Re Davey*, [1915] 1 Ch. 837 (note).

The section, however, has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one"; and a devise to A. with a limitation over on his dying without issue "or" under twenty-one, was held ("or" being read

" and ") to give A. the fee on his attaining twenty-one, *Morris* v. *Morris*, 17 Be. 198; and the section in the Conveyancing Act did not apply to an express limitation to " the heirs of the bodies " of the first takers, *Green* v. *Green*, 3 De G. & S. 480; 18 L. J. Ch. 465. See also *Dawson* v. *Small*, L. R. 9 Ch. 651; 43 L. J. Ch. 406; and *Re Leach*, [1912] 2 Ch. 422; 81 L. J. Ch. 483; *Re Thomas*, [1920] 1 Ch. 515; 89 L. J. Ch. 251. Sect. 29.

In *Re Thomas*, [1921] 1 Ch. 306; 90 L. J. Ch. 113, it was held that a gift over on death " without issue who shall reach the age of 21," was void for perpetuity.

In *Greenway* v. *Greenway* (*ubi sup.*), realty and personalty were comprised in one gift, which was so worded as to give an estate tail in the realty; but it was held, as to the personalty, that the gift over on the death of the beneficiaries without issue took effect upon their deaths without leaving issue living at their decease, and was not void for remoteness, as it would have been if the words " die without leaving issue " had been construed to import an indefinite failure of issue. But see *Weldon* v. *Weldon*, [1911] 1 Ir. R. 177.

Under bequest of personalty to John and James equally, and if John shall die without issue, the property bequeathed to him shall revert to the sons of James, it was held that John did not take the absolute interest in a moiety, *Re O'Bierne*, 1 J. & L. 352.

The section would apply to the case of a gift over on death " without male issue," *Re Edwards*, [1894] 3 Ch. 644; 64 L. J. Ch. 179.

See also H. Sugd. Wills, 96—107; Sugd. R. P. Stat. 383—388; Hawkins, Constr. Wills, ch. xvii.; Theobald, Constr. Wills, 708.

ESTATE OF TRUSTEES.

XXX. And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable or an estate of freehold shall thereby be given to him expressly or by implication (*a*). Sect. 30. No devise to trustees or executors, except, &c., shall pass a chattel interest.

(*a*) See *Malcolmson* v. *Malcolmson*, 17 L. T. (o.s.) 44; *Spence* v. *Spence*, 12 C. B. (N.S.) 199; 31 L. J. C. P. 189; *Marshall* v. *Gingell*, 21 Ch. D. 790; 51 L. J. Ch. 818.

With respect to this and the following section, it has been said that " the general result of the two consecutive provisions seems to be, first, that a devise to a person upon *any* trust, or to an executor as such, either indefinitely or for any estate (except an estate of freehold, express or implied, or a definite term), will give the fee or other the whole interest, *notwithstanding* any indication of a contrary intention; and secondly, that a devise to a person, without such a limitation of his estate as would exclude all constructive modification, upon any trust or trusts, either not being or not including a trust to continue for life (which ingredient, by letting in the implication of an estate for life, would bring the case within the previous provision), or being or including a trust to continue for life, but capable of outlasting the life, will likewise imperatively give the fee or other the whole interest," 1 Hayes, Conv. 396. Again, " the 30th and 31st sections of the Wills Act have been described as obscure and even Devises to trustees pass the fee, when. Sects. 30, 31, compared.

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conflicting: their meaning, however, will be apprehended by observing, that the 30th section, which speaks of a devise passing 'the fee simple or other the whole *estate or interest* of the testator,' relates to the quantity of estate to be taken by a trustee for the purposes of the trust; while the 31st section, which declares that a devise shall vest in trustees, 'the fee simple or other the whole *legal estate*' in the premises devised, relates to the disposition of the legal estate not required for the purposes of the trust. The 30th section enacts that in no case shall trustees or executors be held, for the purposes of the trust, to take an indefinite term of years; the 31st section enacts that where the estate of the trustees is not expressly limited, they shall in all cases take either an estate determinable on the life of a person taking a beneficial life interest in the property, or the absolute *legal* estate in the fee simple," Hawkins, Constr. Wills, 192. In *Freme* v. *Clement*, 18 Ch. D. 499; 50 L. J. Ch. 801, the M. R. said that sect. 31 was probably another drafting of sect. 30, and he believed the real history of the two sections was that they were two drafts dealing with the same subject, though both remained in the Act. And see *Yarrow* v. *Knightley*, 8 Ch. D. 736; 47 L. J. Ch. 874.

See also Sweet, Wills, 153—155; Sugd. R. P. Stat. 389 *et seq.*

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, the real estate of a person dying after the commencement of the Act (January 1, 1898) devolved to and became vested in his personal representatives or representative from time to time as if it were a chattel real, notwithstanding any testamentary disposition; and by sect. 2, subject to the powers, rights, duties, and liabilities in the Act mentioned, the personal representatives of a deceased person held the real estate as trustees for the persons by law *beneficially* entitled thereto. After 1925 real estate devolves on the personal representatives under sect. 1 of the Administration of Estates Act, 1925. It would seem that where there is an executor and there are also trustees to whom the real estate has been devised upon trusts, the trustees could, when the estate had been administered, call upon the executor to assent to the devise, or to convey to them under sect. 36 of the Administration of Estates Act, 1925. See Jarm. Wills, ch. xlvi.

ESTATE OF TRUSTEES.

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Trustees under an unlimited devise, &c., to take the fee.

XXXI. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple (*a*) or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied (*b*).

Estate of trustees.

(*a*) In an unreported case of *Penrice* v. *Penrice*, where a testator devised to trustees and their heirs, in trust to accumulate the rents for twenty years, and subject thereto, to the use of A. B. for life, with

remainder to the same trustees upon other trusts, and with remainders over, it was held by the Court of Common Pleas (Dec., 1848), upon a case sent by the Court of Chancery, that by virtue of this section the trustees took the fee immediately upon the testator's death. Where lands were devised to trustees, their heirs and assigns, to the use of A. during his life, with remainder to the use of such children of A. as should attain twenty-one, as tenants in common in fee, and the trustees were empowered to apply the rents for the maintenance of the children during minority, it was held (mainly on the provision as to maintenance, and without deciding whether A.'s estate was legal or equitable) that on the death of A. the legal fee was in the trustees, *Berry* v. *Berry*, 7 Ch. D. 657; 47 L. J. Ch. 182; *Re Brooke*, [1923] 2 Ch. 265; 92 L. J. Ch. 504. Sect. 31.

(*b*) In the case of wills coming into operation after the year 1925 the trustees will in all cases take an estate in fee simple or for a term of years absolute, Law of Property Act, 1925, s. 1.

As to the operation of the Land Transfer Act, 1897, and the Administration of Estates Act, 1925, upon devises to trustees, see note to sect. 30, *ante*.

LAPSE OF ESTATE TAIL.

XXXII. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in *quasi* entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*a*). Sect. 32. Devises of estates tail shall not lapse.

(*a*) See Sugd. R. P. Stat. 391. This section will apply to entailed interests in personalty in wills coming into operation after 1925, under sect. 130 (1) of the Law of Property Act, 1925.

LAPSE—CHILDREN OR ISSUE DYING IN TESTATOR'S LIFETIME.

XXXIII. And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*a*). Sect. 33. Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

(*a*) The provision of this section against lapse, though inapplicable to the exercise of a special power of appointment by will, *Griffiths* v. *Gale*, 12 Sim. 327, 354; 13 L. J. Ch. 286; *Holyland* v. *Lewin*, 26 Ch. D. 266; Sect. 33, inapplicable to special, applicable to

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53 L. J. Ch. 530, is applicable to the exercise of a general power of appointment by will, *Eccles* v. *Cheyne*, 2 K. & J. 676.

general powers of appointment.

This section does not substitute the issue of the intended taker for the deceased, but makes the subject of the gift the property of the intended taker, and, as such, comprised within the dispositions of his will, notwithstanding he died before the testator, *Johnson* v. *Johnson*, 3 Ha. 157; 13 L. J. Ch. 79; 1 Hayes, Conv. 406; or descendible as part of his estate, *Wisden* v. *Wisden*, 2 S. & G. 396; *Skinner* v. *Ogle*, 1 Rob. 363; *Re Wilson*, 89 L. J. Ch. 216; or vest in his trustee in bankruptcy, *Re Pearson*, [1920] 1 Ch. 247; 89 L. J. Ch. 123; and estate duty is payable as if the intended taker had survived the testator, *Re Scott*, [1901] 1 K. B. 228; 70 L. J. K. B. 66. Property bequeathed by a testator to his daughter, who died in his lifetime, but whose child and husband survived him, is not within a covenant to settle property coming to the daughter during coverture, *Pearce* v. *Graham*, 1 N. R. 507; 32 L. J. Ch. 259; but the husband is entitled to his curtesy, *Eager* v. *Furnivall*, 17 Ch. D. 115; 50 L. J. Ch. 537.

Issue not substituted, but subject-matter becomes part of estate of intended taker.

Where a testator made a bequest to his daughter to be subject, if she survived him, to the trusts of her marriage settlement, and she died in his lifetime leaving issue living at his death, it was held that under sect. 33 she must, for all the purposes of the will, be taken to have survived the testator, and that the bequest must be paid to the trustees of her settlement and not to her administrator, *Re Hone's Trusts*, 22 Ch. D. 663; 52 L. J. Ch. 295.

Provisions against lapse.

Where a father devised to his son, who died before him leaving issue living at the father's death, and the son had left a will devising all his real estate to his father, the son was to be deemed to have survived his father, the devise to his father therefore failed, and the heir-at-law of the son was entitled, *Re Hensler*, 19 Ch. D. 612; 51 L. J. Ch. 303.

Where the legatee was a married woman whose husband survived her, but also died in the testator's lifetime without having administered to his wife, limited administration was granted to a son of the legatee, *In b. Councell*, L. R. 2 P. & D. 314; 41 L. J. P. 16; *Re Allen's Trusts*, [1909] W. N. 181.

It does not appear to have been decided whether, as to bequests to a child of the testator which are by this section protected from lapse, the will of the child is to be construed as at the death of the child or of the parent; but whichever period is taken, the will of the child must be construed as if the will of the parent was then in existence, see *Re Mason's Will*, 34 Be. 494; 34 L. J. (N.S.) Ch. 603. And the child's estate is in the same position, *quoad* the parent's will, as if he had survived the parent, *Pickersgill* v. *Rodger*, 5 Ch. D. 163.

Child *en ventre*.

A child *en ventre sa mère* would be issue left by the devisee or legatee within the meaning of this section, *Re Griffiths' Settlement*, [1911] 1 Ch. 246; 80 L. J. Ch. 176.

A doubt arose on the words of this section, "leaving issue, and any such issue of such person shall be living at the time of the death of the testator," whether, to prevent a lapse, it was necessary that the issue of the intended recipient who is alive at the death of the testator should be the same issue who was alive at the death of the intended recipient. It has been decided that it is sufficient, to prevent a lapse, that *any* issue should be living at the death of the testator, *In b. Parker*, 1 Sw. & Tr. 523; 31 L. J. P. 8.

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As to dates of the bequest, and the death of the intended taker.

Sect. 33 not applicable to gifts of classes.

The Act applies to a case where a child died before the will was made, *Winter* v. *Winter*, 5 Ha. 306; *Mower* v. *Orr*, 7 Ha. 473; 18 L. J. Ch. 361; *Barkworth* v. *Young*, 4 Drew. at p. 19; 26 L. J. Ch. 153.

This section does not apply where the gift is to the testator's children or grandchildren as a class, *Olney* v. *Bates*, 3 Drew. 319; *Browne* v. *Hammond*, Joh. 210, even if, in the events which happen, the class may consist of but a single individual, *Re Harvey's Estate*, [1893] 1 Ch. 567; 62 L. J. Ch. 328; see also *Re Stansfield*, 15 Ch. D. 84; 49 L. J. Ch. 750; *Re Butler*, [1918] 1 I. R. 394. Where the bequest was to the testator's "children living at his death," and one child, Henry, died leaving issue, it was held that the representatives of Henry took nothing, and that the other children alone were entitled, *Fullford* v. *Fullford*, 16 Be. 565. But where the gift was to a class, and the share of each daughter was settled upon her for life, and after her death for her children, the children of a daughter who died before the testator were entitled to share, *Unsworth* v. *Speakman*, 4 Ch. D. 620; 46 L. J. Ch. 608; but this case was not followed in *Re Roberts*, 30 Ch. D. 234; 53 L. J. Ch. 1023.

Where the gift was to trustees upon trust for testator's four sisters (by name) in equal shares, "Provided always, and I declare that my trustees shall retain the share of each of my sisters upon the trusts following," which were for each sister for life with remainder to her issue, and one of the sisters died in the lifetime of the testator, the direction to the trustees to hold the share on trust saved the share from lapsing, and the sister's children were accordingly held entitled thereto, *Re Pinhorne*, [1894] 2 Ch. 276; 63 L. J. Ch. 607. This case was followed in *Re Powell*, [1900] 2 Ch. 525; 69 L. J. Ch. 788; and *Re Whitmore*, [1902] 2 Ch. 66; 71 L. J. Ch. 673. But see *Re Laing*, [1912] 2 Ch. 386; 81 L. J. Ch. 686.

As to a contrary intention within the meaning of the section, see *Re Meredith*, [1924] 2 Ch. 552; 94 L. J. Ch. 87.

WHEN ACT OPERATES.

Sect. 34.

To what wills and estates this Act shall not extend.

XXXIV. And be it further enacted, That this Act shall not extend to any will made before the first day of *January* one thousand eight hundred and thirty-eight, and that every will re-executed or republished or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of *January*, one thousand eight hundred and thirty-eight.

SCOTLAND.

Sect. 35.

Not to Scotland.

Scotland.

XXXV. And be it further enacted, That this Act shall not extend to Scotland (*a*).

(*a*) As to land in Scotland, see the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), the Conveyancing (Scotland) Acts (1874

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and 1879) Amendment Act, 1887 (50 & 51 Vict. c. 69); and see the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58), s. 3 (2), set out in the notes to sect. 11, *ante*. By the joint effect of these Acts with 24 & 25 Vict. c. 114 (see Appendix on Domicile), it would seem that land in Scotland may now be devised by a will made in England and in English form, and unless expressly excepted it will pass by a general devise in an English will.

Colonies. As to the colonial law of wills, see 4 Dav. Con. 350, and Jarm. Wills (5th ed.), Appendix A.

Isle of Man. The Manx Wills Act, 1869, adopts many of the provisions of the English Act of 1837.

AMENDMENT.

Sect. 36.

XXXVI. [Repealed by 37 & 38 Vict. c. 35] (*a*).

Repeal.

(*a*) The Act remains intact with the following exceptions:—

(1) The initial words have been repealed by the Statute Law Revision Act, 1893 (56 Vict. c. 14). *Vide supra*, sect. 1, note (*a*).

(2) Section 2 has been repealed by the Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35).

(3) Section 3 has been explained by sect. 178 of the Law of Property Act, 1925.

(4) Section 8 has been virtually repealed by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(5) Section 9 has been amended by 15 & 16 Vict. c. 24 (*infra*)—or rather, the section has been explained, and the construction originally placed upon it by the Ecclesiastical Court has been negatived.

(6) Section 11 has been explained and extended by the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58).

(7) Section 12 has been repealed by the Admiralty, &c. Acts Repeal Act, 1865 (28 & 29 Vict. c. 112); and provision respecting the wills of petty officers and seamen of the Royal Navy and Marines, so far as relates to their wages, prize money, bounty money, or any money or effects in charge of the Admiralty, is now made by 28 & 29 Vict. c. 72, for which and for the Acts amending it see *ante*, sect. 12, note (*a*), p. 29.

(8) Section 18 has been amended by sect. 177 of the Law of Property Act, 1925.

(9) Section 26 has been repealed by the Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35).

(10) A power to dispose of entailed property has been conferred by sect. 176 of the Law of Property Act, 1925.

Lastly it is provided by Schedule 9 (3) of the Law of Property (Amendment) Act, 1924 (15 Geo. 5, c. 5), that the Wills Act takes effect to enable equitable interests to be disposed of subject and without prejudice to the estate and powers of a personal representative.

THE WILLS ACT AMENDMENT ACT, 1852.

15 & 16 Vict. c. 24.

An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled An Act for the Amendment of the Laws with respect to Wills.

[17th June, 1852.]

["Whereas the laws with respect to the execution of wills require further amendment": be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—]*

Sect. 1.

1. Where, by an Act passed in the first year of the reign of her majesty Queen *Victoria* intituled *An Act for the Amendment of the Laws with respect to Wills*, it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will that it shall be apparent on the face of the will, that the testator intended to give effect by such his signature to the writing signed as his will (*a*), and [that]* no such will shall be affected by the circumstances that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*b*), or by the circumstances that the signature shall be placed among the words of the testimonium clause or of the clause of attestation (*c*), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses (*d*), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature (*e*), or by the circumstance that there shall appear to be sufficient space on or at the

When signature to a will shall be deemed valid.

* The words here placed in brackets were repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19)

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bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature (*f*); and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath (*g*) or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made (*h*).

Cases on the Wills Act Amendment Act, 1852.

(*a*) See *In b. Gausden*, 2 Sw. & Tr. 362; 31 L. J. P. 53; *Trott* v. *Skidmore*, 2 Sw. & Tr. 12; 29 L. J. P. 156; *Cook* v. *Lambert*, 3 Sw. & Tr. 46; 32 L. J. P. 93, in which case probate was decreed where the mark of the testator and the signatures of the witnesses were on a separate piece of paper, attached by wafers to that on which the body of the will was written. See also *In b. Jones*, 4 Sw. & Tr. 1; 34 L. J. P. 41; *In b. Wright*, 4 Sw. & Tr. 35; 34 L. J P. 104; *In b. Williams*, L. R. 1 P. & D. 4; 35 L. J. P. 2; *In b. Coombs*, L. R. 1 P. & D. 302; 36 L. J. P. 25. In *Sweetland* v. *Sweetland*, 4 Sw. & Tr. 6; 34 L. J. P. 42, the testator and witnesses signed each of five sheets; on the sixth were the testimonium and attestation, and the signatures of the witnesses, but not of the testator: although the dispositive part of the will was complete in the five sheets, the Court could not admit those sheets to probate; there was no signature at the foot or end of the will. See also *In b. Dilkes*, L. R. 3 P. & D. 164; 43 L. J. P. 38; *Margary* v. *Robinson*, 12 P. D. 8; 56 L. J. P. 42; *In b. Hughes*, 12 P. D. 107; 56 L. J. P. 71.

(*b*) In *In b. Anstee*, [1893] P. 283; 63 L. J. P. 61, where the signature of the testator and the attesting witnesses appeared at the bottom of the first page of a will which was continued on the second page, probate was granted of the first page of the will. And see *Royle* v. *Harris*, [1895] P. 163; 64 L. J. P. 65.

Signature in testimonium or attestation clause.

(*c*) Decisions to this effect were given before the passing of this Act, *In b. Gunning*, 1 Rob. 459, where the testator's signature was in the testimonium clause; and *In b. Woodington*, 2 Cur. 324, where the signature was in and formed part of the attestation clause. See also *In b. Chaplyn*, 10 Jur. 210; *In b. Dinmore*, 2 Rob. 641. Questions may still arise as to whether the signature of the testator in the testimonium or attestation clause was intended for the testator's signature to the will; for example, where the whole of either of these clauses is in the handwriting of the testator. In *In b. Mann*, 28 L. J. P. 19, the signature of the testator in the testimonium clause (the whole of which clause was in his own handwriting) was held, after some hesitation, to be good. And where the testator read over an attestation clause containing his name, written by himself, in the presence of two witnesses, who subscribed, it was, in the circumstances proved, held that the testator intended to give effect to the will by the signature in the attestation clause, and probate was granted, *In b. Walker*, 2 Sw. & Tr. 354; 31 L. J. P. 62. See also *Smith* v. *Smith*, L. R. 1 P. & D. 143; 35 L. J. P. 65; *In b. Huckvale*, L. R. 1 P. & D. 375; 36 L. J. P. 84; *In b. Casmore*, L. R. 1 P. & D. 653; 38 L. J. P. 54; *In b. Pearn*, 1 P. D. 70; 45 L. J. P. 31; *In b. Moore*, [1901] P. 44; 70 L. J. P. 16.

(*d*) See *In b. Puddephatt*, L. R. 2 P. & D. 97; 39 L. J. P. 84.

(*e*) Where the testator's signature and the testimonium and attesta-

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tion clauses were written on a separate paper, attached to the will by a string just opposite the end of the writing; the execution was held valid, *In b. Horsford*, 3 P. & D. 211; 44 L J. P. 9. A will entirely filled six pages of letter paper, there being no room for an attestation clause on the sixth page; the testatrix signed each of the six pages, and her signature and the attestation clause were on the top of the seventh page; this last signature was the only one made in the presence of or seen by the attesting witnesses. It was held that under the Amendment Act the will was entitled to probate, *In b. Brown*, 16 Jur. 602.

(*f*) *See Hunt* v. *Hunt*, L. R. 1 P. & D. 209; 35 L. J. P. 135; *In b. Archer*, L. R. 2 P. & D. 252; 40 L. J. P. 80.

(*g*) Words were, before the execution of the will, written on the left of and a little lower than the place of the testator's signature; these words were not admitted to probate, although the Court was of opinion that, strictly speaking, they were neither "*underneath*," nor did they "*follow*," the testator's signature, *In b. Greata*, D. & Sw. 266; see also *In b. Topham*, 14 Jur. 47; *In b. Peach*, 1 Sw. & Tr. 138; *In b. Kimpton*, 3 Sw. & Tr. 427; 33 L. J. P. 153; *In b. Woodley*, 3 Sw. & Tr. 429; 33 L. J. P. 154. See, however, *In b. Ainsworth*, L. R. 2 P. & D. 151. In *In b. Greenwood*, [1892] P. 7; 61 L. J. P. 56, the will did not contain any nomination of executors in the body of it, but at the bottom, below the attestation clause, and after the signatures, were the words "executors, W. G. and C. S." There was an asterisk before these words and an asterisk before the word "executor" wherever it occurred in the will. It having been proved that the words were written before the execution of the will, the nomination of executors was allowed to be included in the probate. See also *In b. Birt*, L. R. 2 P. & D. 214; 40 L. J. P. 26. But where the concluding words of disposition followed the signature of the testator and there was nothing to connect the words with the signature, these words were excluded from probate, *In b. Malen*, 54 L. J. P. 91. In the case of the will of an Englishman made in France, a notarial minute of the execution of the will was written on the same sheet as and immediately following the will; the testatrix and the witnesses signed their names at the foot of this minute. The Court held the execution valid, *Page* v. *Donovan*, D. & Sw. 278. See also *In b. Willmott*, 1 Sw. & Tr. 36; *In b. Cattrall*, 3 Sw. & Tr. 419; 33 L. J. P. 106; *In b. Powell*, 4 Sw. & Tr. 34; 34 L. J. P. 107; *In b. Dallow*, L. R. 1 P. & D. 189; 35 L. J. P. 81.

(*h*) See *In b. Arthur*, L. R. 2 P. & D. 273; *In b. Wotton*, L. R. 3 P. & D. 159; 43 L. J. P. 14; *In b. Anstee*, [1893] P. 283; 63 L. J. P. 61; *Royle* v. *Harris*, [1895] P. 163; 64 L. J. P. 65; *In b. Gilbert*, 78 L. T. 762; and *In b. Gee*, 78 L. T. 843.

Sect. 2.

Act to extend to certain wills already made.

2. The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court

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of competent jurisdiction, in consequence of the defective execution of such will (*a*).

(*a*) By this section, every will which had not, prior to June 17, 1852, been pronounced to be defectively executed, is brought within the operation of the amending Act. See note to *In b. Brown*, 16 Jur. 602.

Sect. 3.

Interpretation of "will."

3. The word "will" shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said Act of the first year of the reign of her Majesty Queen *Victoria*.

Sect. 4.

Short title.

4. This Act may be cited as "The Wills Act Amendment Act, 1852."

A PRACTICAL VIEW

OF

THE WILLS ACT.

In the long struggle to enrol among our civil rights the power of testamentary disposition—one of the last consummate fruits of a refined policy—when, as war had preoccupied the land and superstition bespoken the goods, every point was to be carried against feudal or ecclesiastical repugnance, it is not difficult to suppose that a mass of laws would be generated, neither enlightened, comprehensive, nor coherent. The different degrees of dignity and value, naturally attached by our ancestors, in times of chieftainship and violence, to moveable and immoveable property, and again, as regards the soil, to the tenure of the sword and of the plough, to freehold and to leasehold interests (*a*), and the different jurisdictions under which territorial and commercial wealth consequently fell, embarrassed the growth of the much-coveted dominion with numerous distinctions, in themselves artificial and arbitrary, and in their consequences inconvenient, often unjust. Under such various and conflicting influences, both the right of disposing and the forms of disposition were capriciously modified; opposite codes were formed; the law, as respects realty, continued too strict; as respects personalty, grew too lax; and at the period of the legislative revision of this interesting branch of our jurisprudence, when the Wills Act was passed, its general characteristics were complication, diversity, uncertainty. To what extent, and with what success, a remedy has been applied, it will be one of our objects to show, in the observations which

General condition of the old law.

(*a*) The feudal law took little account of tenants for years, occupied, as they were, in the baser pursuits of husbandry; and though a large portion of the landed property of the kingdom is now held under leases for years, such leases, except of lands in Scotland, still rank only as personal estate.

we are about to offer on this statute (*b*) "For the Amendment of the Laws with respect to Wills."

The testamentary power, how affected by the testator's domicile.

But, as we do not address ourselves to the learned reader exclusively, it may be useful to preface our remarks upon the statute, by observing that the validity, construction, and effect of testamentary dispositions are determined, as to immoveable property (including chattels real), by the law of the State within which the subject-matter has its fixed existence; but, as to moveables, which are supposed to accompany our motions, and which really sympathise in our fortunes, by the law of the State within which the testator, at the time of his death, had his domicile or *home* (*c*). Hence, to a greater or a less extent, the self-expatriated Englishman stands excluded from, among other natal and inestimable rights, the advantages held out by the testamentary laws of his country, which breathe the generous freedom of its other institutions. The chief and peculiar advantage of those laws, which he thus in part renounces, consists in the absolute subjection of all his property, real and personal, to his ultimate volition. The law of England, wisely directing its paternal care to the great family of the State, confided private and particular interests to the dictates of natural and moral feeling, and has not repented of its confidence. There have been cases indeed, but such are of rare occurrence, in which, under peculiar circumstances, wills unnaturally injurious to the near relatives of the testator have been successfully impeached on the ground of mental delusion; otherwise, by our law, husbands and parents may leave all their property, without question, to strangers (*d*). This unfettered dominion would, if abused, call for legislative restraint; but while discreetly enjoyed, or rather, while suspended over all, even the most natural expectants, it operates more beneficially than the jealous code of France, which, by limiting the testamentary power to a certain proportion of the testator's possessions, discourages industry, tends continually to a more and more minute sub-division of capital, and curtails the means of promoting obedience, gratitude, affection, within the domestic sphere most adorned by the exercise of those virtues.

Comparative freedom of the English testamentary law.

We now proceed to the principal subject of this Dissertation.

(*b*) 1 Vict. c. 26. The Act was drawn by the late Mr. John Tyrrel, of 11, New Square, Lincoln's Inn, and see *Re Wernher*, [1918] 1 Ch. 339, at p. 359.

(*c*) See the Appendix, on Domicile.

(*d*) See *Rawlins* v. *Goldfrap*, 5 Ves. 444; *Ruttinger* v. *Temple*, 4 B. & S. 491; 33 L. J. Q. B. 1; *Boughton* v. *Knight*, L. R. 3 P. & D. 64; 42 L. J. P. 25.

In what respects the law is altered by the Wills Act.

The Wills Act, whether considered as an enabling, a restraining, or an expounding Act, affects the previous scope and construction of testamentary dispositions to an extent which renders the study of its provisions one of the most important duties of every professional man, and some knowledge of their general bearing matter of deep interest to all. They will be found to relate chiefly to the personal ability of the testator; to the subjects of testamentary disposition; to the exercise of testamentary powers of appointment; to the execution and attestation of wills; to the competency of attesting witnesses; to the revocation and alteration of wills; to the doctrine of lapse in particular cases; and to the construction of wills in certain respects. In regard to each of these matters, the old testamentary rights have been enlarged, abridged, or modified; but the predominating feature of the statute, and what, indeed, constitutes its chief excellence, is the assimilation, as to some points of general importance, of the law of real and the law of personal estate (*e*). This has been effected, for the most part, by allowing an ampler testamentary dominion over the former; though at the cost, in some respects, of privileges (not to be lightly estimated in a free country) before peculiar to the latter. The intention of the unlearned testator is no longer liable to be frustrated by the feudal laws of tenure; the same positive law now regulates the will of realty and the testament of personalty; that law, amended and compressed within one statute of moderate dimensions, may now be consulted, with comparative facility, by all; and the difficulties are reduced, in a great measure, to those which attend the exposition of all written documents, and which, as they sometimes present themselves even in perusing the Act itself, cannot but fall largely to the

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Terms "personal estate," &c., defined.

Leaseholds for years.

(*e*) The term "personal estate," as used in the text, generally includes leaseholds for years, technically called chattels real, as well as money, goods, &c., technically called chattels personal; and the term "real estate," as there used, includes almost all interests, not being leases for years, in land of every tenure. But where the real and personal estate are to go in different ways, care must be taken, in the wording of general devises or bequests, to avoid any question on the operation of sect. 26 of the Act. Leaseholds, for the purposes of the Succession Duty Act (16 & 17 Vict. c. 51), are deemed real property, and chargeable as such with succession duty (ss. 1, 19). In the strictest technical sense the terms "will" and "devise" are appropriated to real estate; and the terms "testament," "bequest," and "legacy," are appropriated to personal estate; but the terms "will," "testator," and "testamentary," are commonly used, as in the text, with reference to either species of property. "Will" and "last will" are synonymous, for a will becomes operative as a will only on the death of the testator, *Lord Walpole* v. *Earl of Cholmondeley*, 7 T. R. 138.

share of a man's last will and testament;—an instrument vainly imagined to possess, whether from long judicial indulgence, or from some peculiar sanctity of character (*f*), the virtue of conveying the clearest ideas in the loosest language.

Repeal of the old statute law.

The whole mass of former enactments respecting wills is repealed in the outset (*g*), and the statute then proceeds to build up, partly on the old foundations and with the old materials, but with unequal skill, what must long form the great institute of English testamentary law.

I. AS TO THE TESTATOR'S PERSONAL ABILITY.

I. The old distinction in regard to the qualifying age, between wills of real and testaments of personal estate, and again, as to the latter, between the sexes—a distinction which denied to all persons under twenty-one the power of devising real estate unless by special custom, but permitted boys (*h*) of fourteen and girls of twelve to bequeath any amount of personal estate—is abolished.

Minors disqualified by the statute.

The statute requires that every testator shall be of the age of twenty-one years (*i*); nor can this enactment be evaded by creating an express power to appoint notwithstanding minority (*k*), or by any other means. Married women were left under the same disability to make a will as before the statute (*l*).

Aliens.

By the British Nationality and Status of Aliens Act, 1914 (*m*), real and personal property of every description may be held and disposed of by an alien (*n*) in the same manner as by a natural-born British subject. This Act, however, does not deal with the question of what is to be the form of the will; as to personalty this is left to be determined according to the law of the alien's country (*o*). The Act does not apply to property acquired

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(*f*) Wills are said to be entitled to a liberal construction for the benefit of the soul of the testator, "Car le volunt de chescun home serra prise ou construe en le pluis large manner que il poet estre reasonablement pur le benefit de le alme de le mort" (T. 17, Henry 7; Kei. 44 b).

(*g*) Sect. 2. But certain provisions of 12 Car. 2, c. 24, are not repealed. And sect. 2 of the Act is now itself repealed (37 & 38 Vict. c. 35), but such repeal does not revive the Acts repealed by sect. 2.

(*h*) See 1 Wms. Exors, pt. 1, bk. 2, ch. 1, generally as to testamentary capacity. And see Wills Act, note (*a*) to sect 11, *ante*.

(*i*) Sect. 7.

(*k*) Sugd. Pow. 178, 910.

(*l*) Sect. 8. See 34 & 35 Hen. 8, c. 5, s. 14. But see now the Married Women's Property Acts, 1882 and 1893.

(*m*) 4 & 5 Geo. 5, c. 17.

(*n*) See *De Geer* v. *Stone*, 22 Ch. D. 243; 52 L. J. Ch. 57.

(*o*) *In b. Von Buseck*, 6 P. D. 211; 51 L. J. P. 9.

under a disposition made before May 12, 1870, or devolving on a death before that date (*p*).

Summary of the existing law as regards personal ability to dispose by will.

Here we may be allowed to make a digression for the purpose of presenting the reader with a summary of the law in regard to testamentary capacity. The persons, then, incapable, wholly or partially, of making a will, are :—

Minors.

1. Minors (*q*).

Married women.

2. Married women, married before 1883, as regards all property acquired before 1883 other than separate estate, except for the special purpose of appointing an executor to continue the personal representation of a testator (*r*) of whose will the *feme* is herself the sole or the surviving executrix, unless enabled by a power (*s*), which some previous settlement or will not unfrequently confers; or unless the husband be banished by Act of Parliament, or have abjured the realm, when the wife's capacity, as discovert, revives (*t*); for although it is true that a married woman may, with the assent of her husband, make a valid testamentary disposition of personal estate not held for her separate use (*u*), yet as such disposition really derives its effect from his sanction, and is not the result of her independent volition, it is not, properly speaking, her *will*. By the Married Women's Property Act, 1882, a married woman may, as to her separate property, dispose thereof by will in the same manner as if she were a *feme sole* (*x*).

Persons of unsound mind.

3. Persons not of a sound disposing mind, whether from idiocy, insanity, lunacy—unless the testamentary act be the fruit of a lucid interval—drunkenness, or any other cause; and here we may suggest with respect to testators of weak understanding, generally, that they should be required to give written instructions, which, if evincing mental power, may be useful as evidence of competency, in aid, at least, of other proof. The presumption that every man is sane until the contrary is proved, is a mixed presumption of law and fact. It is not to be assumed, as a matter of law, that a will is made by a competent testator, but the Court or jury must be convinced of the competency. Therefore, he who relies upon a will in opposition to

Competency of testator.

(*p*) Sect. 17 (5).

(*q*) But see the notes to sect. 11, as to the will of a soldier or a seaman.

(*r*) Shep. Touch. 402; *In b. Bayne*, 1 Sw. & Tr. 132; and see *Re Herbert's Will*, 8 W. R. 272.

(*s*) Sugd. Pow. ch. 5, s. 1, pp. 157—177.

(*t*) *Countess of Portland* v. *Prodgers*, 2 Ver. 104; *Ex parte Franks*, 1 Moo. & S. 11; *In b. Martin*, 2 Rob. 405; 22 L. J. (N.S.) Ch. 248.

(*u*) *Elliot* v. *North*, [1901] 1 Ch. 424, 430; 70 L. J. Ch. 217.

(*x*) See *ante*, Wills Act, s. 8 and note. And see Jarm. Wills 53—59.

the heir-at-law, must produce evidence that the testator was a person of sound and disposing mind; and when such evidence has been produced, it is incumbent on the party alleging the testator's incompetency to prove that the incompetency existed (*y*).

Insanity.

Where a commission in lunacy has issued, and a jury has found that the subject of the commission is of unsound mind, the burden of proof is upon those who contend the contrary (*z*). Thus, a will made by a person who had been found lunatic by inquisition, but who was alleged to have recovered his sanity before his death, was pronounced against, there not being sufficient evidence that the delusions from which he suffered had disappeared (*a*). But the presumption of insanity in such a case may be rebutted by positive evidence of entire or partial recovery (*b*); though, of course, when a will is set up, made by a testator during the subsistence of a commission of lunacy against him, the *onus probandi* lies upon the person propounding the will to establish the complete or temporary recovery of the lunatic, at the times of giving instructions for and executing his will (*b*). In *Dimes* v. *Dimes* (*c*), a will made by a testator of fluctuating capacity was found to have been made in a lucid interval, and was held good. And in *Nichols* v. *Binns* (*d*), where the testator had for years been habitually insane, but with intermissions, and the will was actually executed in a lunatic asylum, the jury having found that it was executed in a lucid interval, probate was decreed. In that case the instructions for the will were designed and written by the testator himself, without assistance, and the will made a natural and equitable disposition of his property; which latter fact was held to be, though not conclusive, strong evidence of the instrument having been made in a lucid interval. Again, in *Symes* v. *Green* (*e*), it was held that if a will, rational on the face of it, is shown to be duly executed, the presumption is that it was made by a person of competent understanding; the testator in that case was subject to insane delusions, the will was in his handwriting, perfectly rational, and in no way connected with or referring to the subject of the delusions; but the circumstances in evidence counterbalanced the presumption of com-

Lucid interval.

Monomania.

Delusions.

(*y*) *Sutton* v. *Sadler*, 5 W. R. 880; 26 L. J. C. P. 284.

(*z*) *Snook* v. *Watts*, 11 Be. 105.

(*a*) *Grimani* v. *Draper*, 6 No. Cas. 418.

(*b*) *Ib.*; *Cooke* v. *Cholmondeley*, 2 M'N. & G. 18; 19 L. J. Ch. 81; *Prinsep* v. *Dyce Sombre*, 10 Moo. P. C. 232

(*c*) 10 Moo. P. C. 422. See also *In b. Walker*, 28 T. L. R. 466.

(*d*) 1 Sw. & Tr. 239.

(*e*) 1 Sw. & Tr. 401; 28 L. J. P. 83.

petency, and the decree was against the will. *Waring* v. *Waring* (*f*) is an important case, in which also the testatrix was subject to delusions, and had been found insane by inquisition, but subsequently to the execution of her will: that document, on the face of it, betrayed no marks of insanity, but it was pronounced against by the Privy Council, in affirmation of the Court below; in delivering the judgment of the Judicial Committee, Lord Brougham entered at length into an exposition of the legal doctrine of monomania (*g*). But delusions may co-exist with testamentary capacity; if the testator comprehends the extent of the property to be disposed of, and the nature of the claims of those he excludes, partial unsoundness, not affecting the general faculties and operating in regard to testamentary disposition, is insufficient to render him incapable of making a will (*h*).

Drunkenness.

As to incapacity from drunkenness or any other cause, see *Garthside* v. *Isherwood* (*i*).

Eccentricity not to be confounded with insanity.

Mere eccentricity must not be confounded with insanity or monomania (*k*). In *Frere* v. *Peacocke* (*l*), it was held that moral insanity, or a moral perversion of the feelings, unaccompanied with delusion, is insufficient to invalidate a will; the eccentricity of the testator must be resolved into intellectual insanity (*m*).

(*f*) 6 Moo. P. C. 341.

(*g*) See also *Greenwood* v. *Greenwood*, 3 Cur. App. i.; *Fowlis* v. *Davidson*, 6 No. Cas. 461; *Johnson* v. *Blane*, 6 No. Cas. 442; *Smith* v. *Tebbitt*, L. R. 1 P. & D. 398; 36 L. J. P. 97.

(*h*) *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549; 39 L. J. Q. B. 237. See also *Boughton* v. *Knight*, L. R. 3 P. & D. 64; 42 L. J. P. 25; *Smee* v. *Smee*, 5 P. D. 84; 49 L. J. P. 8; *Jenkins* v. *Morris*, 14 Ch. D. 674; 49 L. J. Ch. 392; *Hope* v. *Campbell*, [1899] A. C. 1; *Pilkington* v. *Gray*, [1899] A. C. 401; 68 L. J. P. C. 63.

(*i*) Shep. Touch. 403; Swinb. 133; 1 Bro. C. C. 558.

(*k*) *Dew* v. *Clark*, 3 Add. 79; 6 L. J. Ch. 186. See also J. S. Mill, On Liberty, ch. 3.

(*l*) 1 Rob. 442.

(*m*) See also *Goddard* v. *Vere*, 4 No. Cas. supp. ix.; *Wellesley* v. *Vere*, 1 No. Cas. 240; *Austen* v. *Graham*, 8 Moo. P. C. 493.

The following eight propositions were formulated in an article by Mr. A. Wood Renton entitled "Testamentary Capacity in Mental Disease," which appeared in *The Law Quarterly Review* of October, 1888. The authorities upon which these propositions were founded are discussed in the article, and more fully in Wood Renton on Lunacy.

I. A testator must possess a memory sufficiently active to recall the nature and extent of his property, and the persons who have claims upon his bounty; and a judgment and will sufficiently free from the influence of morbid ideas or external control to determine the relative strength of those claims.

II. Intellectual insanity *prima facie* destroys testamentary capacity;

Imbecility and doubtful capacity.

In cases of imbecility, and weak or doubtful capacity, it seems impossible to lay down any general rule; the question is always one of degree, and of that question the particular circumstances in each instance must dispose (*n*).

Undue influence.

Closely, and almost inseparably, connected with questions of imbecility and doubtful capacity, are those of undue influence. In order to set aside on this ground the will of a person of testamentary capacity, it must be shown that the circumstances under which the will was executed are inconsistent with any hypothesis but that of undue influence: the exercise of undue influence cannot be presumed; it must be proved to have been exercised, and exercised, moreover, in relation to the will itself, and not merely to other transactions (*o*). Undue influence, in a popular sense, may exist in the form of bad companionship and bad example, but this is not sufficient to invalidate a will made under its operation. In order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, it must be an influence exercised either by coercion or by fraud; allowing a fair latitude in the interpretation of

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but this presumption may in any case be rebutted by evidence of a lucid interval; or that the insanity and delusions of the testator were irrelevant to the subject-matter of his will, or insufficient to prevent the exercise of a disposing memory, judgment, and will, at the time when the disputed instrument was made.

III. A lucid interval is not necessarily a complete restoration to mental vigour previously enjoyed; nor is it merely the cessation or suppression of the symptoms of insanity; it is the recovery of testamentary memory, judgment, and will as defined in Proposition I.

IV. An insane delusion is not merely an unfounded, though colourable, suspicion; nor even a belief which no rational person would have entertained; it is a persistent and incorrigible belief of things as real which exist only in the imagination of the patient, and which no rational person can conceive that the patient when sane would have believed.

V. Neither subsequent suicide nor supervening insanity will be reflected back upon previous eccentricity, so as to invalidate a will; *aliter* in the case of previous insanity.

VI. Affective, or moral, insanity does not (generally?) destroy testamentary capacity.

VII. Upon the executor who propounds a will rests the burden of proving (a) testamentary capacity; (b) knowledge and approval of contents, and (c) due execution.

VIII. *Prima facie* an executor is justified in propounding his testator's will.

(*n*) *Bannatyne* v. *Bannatyne*, 2 Rob 472; *Deare* v. *Elwyn*, 1 No. Cas. 342; *Mitchell* v. *Thomas*, 6 Moo. P. C. 137; *Wallis* v. *Maughan*, 1 No. Cas. 534; *Harwood* v. *Baker*, 3 Moo. P. C. 282.

(*o*) *Boyse* v. *Rossborough*, 6 H. L. C. 2, 49, 51; 26 L. J. Ch. 256; and the burden of proof is on those alleging undue influence, *Craig* v. *Lamoureux*, [1920] A. C. 349; 89 L. J. P. C 22.

those terms : thus actual violence is not necessary to constitute coercion; but imaginary terrors may be sufficient to deprive the testator of free agency; and contrivances producing false impressions may be equivalent to positive fraud (*p*). Persuasion is not unlawful, but pressure which overpowers the volition, without convincing the judgment, constitutes undue influence, though force be neither used nor threatened (*q*). Natural influence may be lawfully exercised to obtain a will or legacy; and the rules of equity as to gifts *inter vivos* are not applicable to the making of wills (*r*).

Will procured by person benefited, suspicious.

A will written, or procured to be written, by a person who is benefited thereby, is not void; but the circumstance forms a just ground of suspicion, and unless clear and satisfactory proof be given that the document propounded expresses the wishes of the testator, it will be pronounced against (*s*).

Solicitor.

The circumstance of a solicitor preparing for a client a will containing dispositions in his own favour, does not prevent him from taking the benefit, if no undue influence is used (*t*).

Medical attendant.

Wills made during illness in favour of medical attendants are viewed with great jealousy (*u*).

Guardian.

As to the case of guardian and ward, see the remarks in *Hindson* v. *Weatherill* (*x*).

(*p*) *Boyse* v. *Rossborough, ubi sup.; Wingrove* v. *Wingrove,* 11 P. D. 81; 55 L. J. P. 7; *Baudains* v. *Richardson,* [1906] A. C. 169; 75 L. J. P. C. 57.

(*q*) *Hall* v. *Hall,* L. R. 1 P. & D. 481; 37 L. J. P. 40.

(*r*) *Parfitt* v. *Lawless,* L. R. 2 P. & D. 462; 41 L. J. P. 68. On the subject of undue influence in general, see the notes to *Huguenin* v. *Baseley,* in 1 Wh. & Tud. L. C. Eq.; see also *Lyon* v. *Home,* L. R. 6 Eq. 655; 37 L. J. Ch. 674; *Kelly* v. *Thewles,* 2 Ir. Ch. Rep. 510.

(*s*) *Smith* v. *Shelton,* 9 Jur. 715; *Baker* v. *Batt,* 2 Moo. P. C. 317; *Stulz* v. *Schœffle,* 16 Jur. 909. And the rule throwing upon the party propounding a will, prepared by a person who takes a benefit under it, the burden of showing that the paper propounded expresses the true will of the deceased, is not confined to cases in which the will is prepared by a person taking a benefit under it, the true rule being that wherever a will is prepared under circumstances which raise the suspicion of the Court, it ought not to be pronounced for, unless the party propounding it adduces evidence which removes such suspicion and satisfies the Court that the testator knew and approved of the contents of the instrument, *Tyrrell* v. *Painton,* [1894] P. 151.

(*t*) *Hindson* v. *Weatherill,* 5 D. M. & G. 301; *Barry* v. *Butlin,* 2 Moo. P. C. 480; *Butlin* v. *Barry,* 1 Cur. 614, 637; *Walker* v. *Smith,* 29 Be. 394; *Dufaur* v. *Croft,* 3 Moo. P. C. 136; *Waters* v. *Thorn,* 22 Be. 547, a case in which incidentally the evidence of surveyors as to value is discredited.

(*u*) *Greville* v. *Tylee,* 7 Moo. P. C. 320; *Jones* v. *Goodrich,* 5 Moo. P. C. 16; *Reece* v. *Pressey,* 2 Jur. (N.S.) 380; *Ashwell* v. *Lomi,* L. R. 2 P. & D. 477; *Durnell* v. *Corfield,* 1 Rob. 51. And see *Finny* v. *Govett,* 25 T. L. R. 186.

(*x*) 5 D. M. & G. at 313.

Fraud.

A will may also be impeached on the ground of fraud, but the Courts require strong evidence to show that a duly executed will is not the act of the testator, and that he was not aware of its provisions (*y*).

Duress.

Further, a will is invalid if procured from, and executed by, a testator under duress, whether it be duress of imprisonment or duress *per minas*. As to a testator acting under control equivalent to duress, see *Scouler* v. *Plowright* (*z*). Naturally, however, such cases are of rare occurrence; the same result being attainable, not so quickly or directly, but with smaller liability to defeat, by the exercise of a less violent form of coercion, and by the insidious agency of influence and moral control. For an instance of a plea that a testator was prevented by force and threats from executing a new will, see *Betts* v. *Doughty* (*a*).

Capacity impaired by illness.

If a testator has given instructions for his will, and it is prepared in accordance with them, but illness prevents him, at the time of his executing the will, from recollecting anything beyond the fact of his having given instructions, but he believes that the will he is executing is in accordance with them, this limited capacity is sufficient to render the will valid. And this is so although at the time of execution he had no longer the capacity to recollect and understand either the instructions he had previously given, or even each clause inserted in the will if it had been put to him (*b*).

Persons born deaf and blind.

4. Persons born deaf and blind, consequently dumb (*c*), and therefore wholly destitute of the common organs of mental perception: for as "wisdom at one entrance quite shut out" may still find another inlet, or, once admitted, may remain, after all its natural ports are closed against new ideas, nothing short of the original co-existence of all these functional defects can produce legal incapacity (*d*); though, of course, the existence of any peculiarity in regard to the personal circumstances of the testator will dictate additional caution to his professional adviser, as, for instance, that of carefully reading and explaining

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(*y*) *Wrench* v. *Murray*, 3 Cur. 623; *Panton* v. *Williams*, 2 Cur. 530; *Scouler* v. *Plowright*, 10 Moo. P. C. 440.

(*z*) 10 Moo. P. C. 440.

(*a*) 5 P. D. 26; 48 L. J. P. 71.

(*b*) *Parker* v. *Felgate*, 8 P. D. 171; 52 L. J. P. 95; *Perera* v. *Perera*, [1901] A. C. 354; 70 L. J. P. C. 46.

(*c*) Dumbness is not, it seems, in the present state of science, a necessary consequence of congenital deafness, unless vision be also originally deficient. And see Co. Litt. 42 b, where it is said that a man deaf, dumb, and blind from his nativity hath not ability to enfeoffe.

(*d*) 1 Wms. Exors. 12.

the intended will to a blind testator. In all cases comprised under this head, the law proceeds, not upon any narrow technical ground, but on the absence of intellectual power adequate to form, and, by certain signs, to communicate, a rational volition; on the actual, and not the presumable, obscuration or disturbance of that higher faculty which ennobles and distinguishes man. As the inquiry must always be, whether the testator was of competent understanding or not, this head is virtually included under that which immediately precedes it.

5. Persons outlawed; but outlawry in civil proceedings was abolished by 42 & 43 Vict. c. 59, s. 3. Outlaws.

By sect. 1 of 33 & 34 Vict. c. 23, it is enacted that from and after the passing of that Act, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat. Forfeiture consequent upon outlawry is not affected by this statute, and in this case the outlaw cannot make a will, there being nothing for it to operate upon. But in the other cases where forfeiture and escheat are abolished, there seems no obstacle to the making of a will (*e*).

II. But a far more bold and sweeping innovation consists in striking at the ancient requisite, as regards real estate, of ownership in the testator at the making of the will—a requisite peculiar to England, and according to Lord Coke founded on the "having" of the old Statutes of Wills (*f*), but, in fact, more remotely rooted in the "seisin" of the feudal law (*g*)—and by at once enlarging the testator's disposing power to the whole extent of embracing all his property, as well real as personal, whether acquired before or after the execution of the will (*h*). The power expressly includes interests under contingent and executory gifts of every kind, without regard to the fact whether the testator was or was not ascertained as the object of the gift; and even rights of entry, though not rights of action. II. AS TO THE EXTENT OF THE TESTAMENTARY DOMINION. After-acquired property. Rights of entry.

On the other hand, this enactment is rightly confined to property, which, if left to be disposed of by law, would descend to, or devolve upon, the executor or administrator of the Estates not devisable.

(*e*) As to sect. 8 of this Act, which enacts that a convict cannot alienate any property, see *Re Harris*, 19 Ch. D. 1; 51 L. J. Ch. 1. And see Jarm. Wills, 60—62.

(*f*) 32 Hen. 8, c. 1; 34 & 35 Hen. 8, c. 5; *Harwood* v. *Goodright*, Cowp. 90.

(*g*) Year Book, Michaelmas Term, 39 Hen. 6, fol. 18, pl. 23.

(*h*) Sect. 3.

testator (*i*); in other words, to property which, if undisposed of by the deceased possessor, would follow the ordinary course of succession ordained by law, and be liable in the hands of the successors, or his real or personal representatives, to satisfy his debts and engagements generally (*k*); but an estate limited to heirs of the body, *i.e.*, an estate tail, devolves under the peculiar protection of the legislature (*l*) in an extraordinary manner, and is not to be diverted from the course marked out on its creation, without the observance of certain appropriate forms prescribed by the same supreme authority. Tenants in tail, therefore, could not dispose by will without barring the entail (*m*); but the devise of a tenant in tail would, if he afterwards acquired the fee, be effectual (*n*). Still less can the testator, by his posthumous act, defeat a title beginning in his lifetime and consummated by his death. Hence, a joint-tenant, as such, cannot devise or bequeath; for the *jus accrescendi*, incident to that species of tenancy, vests at the instant of his death, and to treat the will as a severance would be to allow it the effect of a conveyance *inter vivos*; but if a joint-tenant, having made a will which but for the joint-tenancy would pass the property, should, by severance, partition, or survivorship, become the owner in severalty of the whole or part, divided or undivided, his previous devise would, of course, be operative. In short, under the sweeping powers conferred by the statute, a man, by his will, executed presently, may dispose of all that can, at his death, be justly denominated his own.

Estates tail.

Estates in joint tenancy.

Enlarged operation of a general devise

It would follow from the above extension of the devising power, unaided by another enactment (*o*) to be presently noticed, that a general devise of real estate must have an operation commensurate, at least, with that which, under the old law, was peculiar to a general bequest of personal estate—the operation of passing whatever property falling within the terms of the gift may belong to the testator at his death. Thus, a devise of all the testator's lands, or of all his lands in a particular county, parish, or occupation, or held by a particular tenure, would draw to itself all future acquisitions of the given descrip-

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(*i*) Sect. 3; and see sect. 1.

(*k*) As to escheat, see *ante*, p. 4; see and consider 3 & 4 Will. 4, c. 106, s. 2; and see 60 & 61 Vict. c. 65.

(*l*) 13 Edw. 1, c. 1 (Statute de Donis Conditionàlibus).

(*m*) 3 & 4 Will. 4, c. 74 (*England and Wales*); 4 & 5 Will. 4, c. 92 (*Ireland*).

(*n*) In a will executed after 1925, a tenant in tail in possession can dispose of the entailed interest under sect. 176 of the Law of Property Act, 1925.

(*o*) Sect. 24.

tion from whatever source derived. This potency of a general devise may suggest the expediency, in some cases, of providing for the eventual acquisition of real estate by the testator, and in others, of cautiously restricting the devise to property already acquired. —suggests what cautions.

Copyhold and customary estates, to which the testator was entitled as a devisee or surrenderee, but to which he had not been admitted, could be devised without his previous or subsequent admittance (*p*). The statute embodies and amends the provisions of a former Act (*q*) for superseding the necessity of surrendering copyholds to the use of the will, so that no surrender was needed to give effect to a devise of copyholds, or of any other species of customary estates (*r*), unless the surrender were, as it was in the case of a joint-tenant or of a *feme covert*, something more than a formal requisite. But although a surrender to the use of the will was thus dispensed with, the Act still left the estate in the customary heir till the admittance of the devisee (*s*). The statute also confers a devising power on such copyhold and customary tenants as were before restrained by the particular custom from devising (*t*). See now *ante*, p. 7, note (*a*). Copyhold and customary estates.

Estates *pur auter vie*, as leases for the lives of others are technically called, which were first made devisable by the Statute of Frauds (s. 12), have likewise retained their former position (*u*); except that the extension of the devising power to interests which would have devolved to the heir (meaning, of course, the heir general), may be considered as impliedly denying the power of testamentary disposition to *quasi* tenants in tail of lands held *pur auter vie* (of which, as not being regularly entailable, entails were, and still are, barrable by an unenrolled (*w*) conveyance), and as having thereby finally disposed of any lingering doubt respecting the incompetency of such tenants to defeat the *quasi* entail by will (*x*). Estates *pur auter vie*.

This portion of the statute, which has given, expressly, to the testamentary power all the scope of which it appears to be fairly susceptible, must always be considered as the most valuable.

III. The exemption of testamentary appointments from the necessity of referring or alluding to the power, or its subject, or of otherwise indicating, expressly or constructively, an inten- III. AS TO THE EXERCISE OF TESTAMENTARY POWERS OF APPOINTMENT—

(*p*) Sect. 3; and see sects. 4, 5.
(*q*) 55 Geo. 3, c. 192.
(*r*) Sects. 3, 4, 5.
(*s*) *Garland* v. *Mead*, L. R. 6 Q. B. 441.
(*t*) Sect. 3.
(*u*) Sects. 3, 6.
(*w*) See note (*d*), Prec. 10.
(*x*) See Jarm. Wills, 74.

tion to appoint by virtue of a power as distinguished from an intention to devise or bequeath by force of an interest, may also be considered as extending the range of testamentary dominion, while it extinguishes a prolific source of litigation; for the distinction was too refined to be appreciated by ordinary testators, and many a testamentary appointment, therefore, either failed, or was capable of being supported only by extrinsic evidence. But now a gift, in general terms, acts indifferently upon ownerships and testamentary powers (*y*), whether the power was created before or after the statute came into operation, unless the power be confined to specific objects (*z*), whether individuals or classes (as in the instance of a power to appoint in favour of A., or in favour of the "children" of A.), and then there must still be a reference to the power, or some equivalent denotation of the intention to exercise it.

—by a general devise or bequest.

It should seem that the operation of a general gift upon general testamentary powers must be determined by analogy to its effect upon after-acquired property, strictly such; and that, consequently, where a general power of appointment is given to the survivor of A. and B., the power would be well exercised by a general devise or bequest contained in the will of A., though made in B.'s lifetime, if the testator, by surviving B., should eventually become the donee of the power (*a*); and that principle has been held to extend to the case of a general power given to the testator by an instrument not in existence at the making of his will (*b*), and to the case of a general equitable testamentary power given to the survivor of A. and B., which has been held to be well exercised by the will of A., a married woman, executed during coverture in the lifetime of B., whom A. survived (*c*).

After-acquired general powers.

IV. AS TO THE EXECUTION AND ATTESTATION OF WILLS.

IV. While the old law studiously guarded devises of freehold estates, by prescribing certain formalities of execution and attestation (*d*), it was altogether indifferent, on these points, as to bequests of personal estate and devises of copyhold property. There were two objects, therefore, to be accomplished: first, to render the law, in this respect, uniform; secondly, to render it simple and certain.

State of the old law.

The statute 1 Vict. c. 26, s. 9, requires that wills of every description, except wills of personal estate made by soldiers in actual service and by mariners and seamen at sea (*e*), shall be

The present requisites.

(*y*) Sect. 27.
(*a*) Sects. 3, 24, 27.
(*c*) *Ante*, p. 52.
(*e*) But see now notes to sect. 11.
(*z*) See *ante*, p. 60.
(*b*) *Ante*, p. 58.
(*d*) 29 Car. 2, c. 3, s. 5.

signed at the foot or end of the instrument by the testator or some person in his presence and by his direction : which signature is to be made, or acknowledged, before two or more witnesses, who are to be present at the same time, and are to attest and to subscribe the will in the presence of the testator; but the concluding member of the section declares that no form of attestation shall be necessary. The terms in which these essential ceremonies—ceremonies to be observed by all—are enacted, were but ill-adapted to convey the requisite information, promptly and clearly, to either the professional or the popular mind. The litigation upon the 9th section became frequent and serious. Many wills were declared invalid for want of a literal compliance with the terms of the Act, especially with regard to the position of the testator's signature at the "foot or end" of the will. The legislature again interposed, and by the Act 15 & 16 Vict. c. 24, provided for many of the particular cases in which wills had been held to be imperfectly executed under the 9th section. We proceed to indicate, as briefly and distinctly as may be, those ceremonies attending the execution of a will, which a safe exposition of the two statutes taken together, and a due regard to the authentication of the instrument, and to the rights of property, seem to enjoin or strongly recommend.

1. Signing by, or for, the testator.

1. The testator should sign his name in his usual form and manner underneath the last line of the will; and his signing must precede that of the witnesses, for if the witnesses, or either of them, sign before the testator, the execution is bad. The testator, if unable to write his name, should cause some person, in his presence, so to sign his (the testator's) name; for though a mark, but not a seal, would *do*, yet, at this day, a mark is a very rude and unauthentic mode of signing. If it can be avoided, though there are no words in the statute on which any legal objection can be founded, the person procured to sign for the testator should not be also one of the witnesses.

2. Acknowledgment, by the testator, of a previous signature.

2. Where the will has been signed in the absence of the witness either by or by the direction of the testator, he should audibly acknowledge to the witnesses,—for though constructive acknowledgment may be sufficient, and, in particular cases, as that of a dumb testator, more could not reasonably be required, still an express acknowledgment is to be preferred—that the signature was made by him, or, as the case may be, by a designated individual in his presence and by his direction; and even where the act of signing is performed in the presence of the witnesses, it will be proper that their attention should be particularly directed to the signature. But if the will consist

of several sheets—though for greater certainty, and to prevent interpolation, each should be signed at the foot—it is not absolutely necessary to sign, or to acknowledge the signing of, any other than the last sheet in the presence of the witnesses.

3. Disclosure of the character of the instrument.

3. Though it is not essential that either the person, if any, who signs for the testator, or the witnesses, should have the slightest knowledge of the nature of the document—for even while publication, now expressly abolished (*f*), was a legal though an empty sound, the testator might have been silent if not deceptive upon that point—yet, unless there be some strong motive for concealment, the testator will do well to declare that the document is his will, or, as the case may be, a codicil to his will. It is desirable that the several sheets, if more than one, composing the will, should be attached, or, at least, be present together at the time of execution.

4. Presence, and subscription, of the witnesses.

4. The witnesses must be two (or more) in number, and must be simultaneously present, when the signature by or for the testator, or his acknowledgment, is made; the testator and the witnesses should be within sight and hearing of each other; and although the statute does not say that the witnesses shall subscribe at the same time, or in the presence of each other, as well as of the testator, the three should not separate till the witnesses have both subscribed. Such subscription, which must be in the witness's own handwriting, should contain his name written in his usual form and manner—though a mark, which, as we have seen, even in the case of the testator, satisfies the statute, would be a sufficient subscription by a witness, and initials are enough—also his abode and quality. The witnesses are required to attest, as well as to subscribe. By the attestation here contemplated must be understood that mental observation which enables men to testify concerning matters transacted before them; for the notion, founded on a misconstruction of a subsequent provision of the statute, that the solemnity of attesting may now be fulfilled by corporeal presence alone, has been too hastily adopted. With respect to the number of witnesses, the statute has fixed no maximum. The place of residence and the occupation of each witness should be appended to his name, to facilitate his discovery in case the will has to be proved *per testes*.

5. Memorandum of attestation.

5. An attestation clause is not necessary. Such is conceived, at least, to be the true result of this somewhat obscure section (*g*), made darker by the last explanatory adjunct. But a formal memorandum should always be added in order to

(*f*) Sect. 13.
(*g*) Sect. 9.

facilitate probate, which would not otherwise be granted without a special affidavit; to afford evidence of title to the property devised, for a purchaser would otherwise require a statutory declaration (*h*) by the witnesses; and lastly, to fix the attention of the witnesses upon the facts which it is expedient that they should certify, and which, having thus certified, they could not afterwards so effectually deny. This clause should express that the instrument has been signed—not, as heretofore, "signed and published," for no publication is requisite (*i*)—by the testator (or, as the case may be, signed by a designated individual, in the testator's presence and by his direction), as the last will of the testator, in the presence of the witnesses, present at the same time; also, that the witnesses have subscribed in his presence—so far the memorandum would record matters which are of the very essence of the execution—and (it may be well to add) in the presence of each other. At the foot of this memorandum, and not elsewhere, the witnesses, having first perused it, should sign as directed under the preceding head. (See note (*e*) to Prec. 1.)

6. Selection of the witnesses.

6. As witnesses, being either objects, or married to objects, of the testator's bounty, absolutely forfeit, by the act of subscribing, the benefits intended for them, they are, of course, improper, though sufficient (*k*) witnesses; and the persons selected for such a duty should, as will naturally occur, be intelligent, as well as indifferent, persons (*l*).

7. Universality and inflexibility of the statutory requisites.

7. ALL testamentary papers, without exception (*m*), must be executed and attested in the manner prescribed by the statute, and its provisions cannot be evaded, even by means of a power created for the purpose. In preparing testamentary appointments, it was formerly the practice to consult the power as to the requisites of execution and attestation; but equity (always prone when legal fetters annoy its jurisdiction to erect itself into a court of repeal) aided in favour of particular claimants the neglect of that form which the power had prescribed (*n*). But now the statute is the sole, universal, and inexorable guide; nothing additional can be imposed, nothing there enjoined can be dispensed with, no inadvertence can ever be helped. Therefore, testamentary appointments must be executed and attested according to the statute, and should be executed and attested without regard to the power, whether

Testamentary appointments.

(*h*) 5 & 6 Will. 4, c. 62.
(*i*) Sect. 13.
(*k*) Sect. 15.
(*l*) 1 Hayes, Conv. 363.
(*m*) Other than wills made by soldiers on actual military service or by mariners under sect. 11, for amendment of which see note thereto.
(*n*) Sugd. Pow. ch. xi.

the power were created before or after the statute came into operation; and clauses which confer testamentary powers should either be wholly silent in regard to execution and attestation, or simply refer to the statute.

V. As to the revocation and alteration of wills.

V. We now proceed to the revocation and the alteration of wills. These also are placed on a new basis; for not only is a revoking will, whether of real or of personal estate, subjected to the same regulations, in regard to execution and attestation, as a disposing will (*o*), but other important changes are introduced.

Revocation by marriage.

Thus, the mere marriage of a testator produces a total revocation (*p*)—except of testamentary appointments in cases where the property would not, in default of appointment, go to the testator's heir, executor, administrator, or statutory next of kin—without the additional circumstance, formerly requisite, of the birth of a child; so that, in this respect, the will of a man is placed on the same footing as that on which the will of a woman formerly stood, and, indeed, still stands. The language of this enactment, it will be observed, is absolute; and, therefore, the revocation would not be prevented by the strongest declaration of the testator that his will shall, notwithstanding any future or even an actually contemplated marriage, continue in force. It is easy to suppose that cases may occur in which the testator's intention would not be altered by the change of his condition; as where he has made a disposition in favour of his family by a deceased wife, and contracts marriage again with a woman for whom he has amply provided by a jointure, and by whom there is not any moral chance of his having issue. The undistinguishing operation of this enactment, by which on the marriage of every person, male or female, under any circumstances, his or her will is reduced to waste paper, should be generally known.

Change of circumstances.

But as the statute abolishes revocation on the ground of a presumed intention from an alteration of circumstances (*q*), marriage is now the only extrinsic circumstance capable of working a revocation.

New modification of estate.

The statute also abolishes revocation by means of a conveyance (*r*), except so far as the conveyance, by substantially aliening the property, withdraws it from the

(*o*) Sects. 20, 21 and 22.

(*p*) Sect 18. But see now the amendment of that section by sect. 177 of the Law of Property Act, 1925, noted *ante*, p. 35.

(*q*) Sect. 19.

(*r*) Sect. 23.

testator's control. A devise, therefore, unless specially restricted, will operate on whatever interest the testator may have in the property at his death, notwithstanding any new modification or partial alienation of his ownership, which may have taken place subsequently to the execution of the will. The constructive revocation of devises, by the execution of conveyances designed only to create a charge upon the estate or to effect some other limited purpose, but stretched by technical reasoning far beyond the intention, often produced injustice (*s*).

Destruction of the instrument.

Under the old law, a will might have been revoked by burning, tearing, cancelling, or obliterating, without the presence or attestation of any witness; proof or presumption that the act was that of the testator sufficed. The statute, however, makes this important distinction between the act of burning, tearing, or otherwise destroying the substance of the will, and a mere obliteration of its contents—it allows the former acts, if done *animo revocandi*, still to have a revoking effect, though unattested and unseen by any witness (*t*); while any obliteration, whether of the whole or part only of the will, as well as an interlineation, is required to be executed and attested with the same solemnity as an original will (*u*), except that (and here the legislature must be allowed to speak its own peculiar language) "the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator, and the subscription of the witnesses, be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

Obliteration and interlineations.

Cancellation.

It is important to bear in mind the fact that this statute does not, like the former law (*x*), admit of the revocation of a will by cancellation, without more; and, therefore, if a testator, meaning to annul his will, should draw his pen across the sheets, or through his signature, or have recourse to any other mode of defacing the writing, still the instrument, so far as its contents might yet be discernible, would remain in full force as his will, unless such cancellation were executed and attested as the statute requires in the case of a will.

Revival of revoked wills.

Before we close this head, attention should be particularly pointed to the circumstance, that the revival of a revoked will, whether revoked before or after the statute came into operation,

(*s*) Jarm. Wills, ch. vii., sects. 6 and 17.
(*t*) Sect. 20.
(*u*) Sect. 21.
(*x*) 29 Car. 2, c. 3 (Statute of Frauds).

can be effected only by re-execution, or by a codicil expressive of an intention to revive the will.

VI. As to the lapse of devises and bequests.

VI. Considerable alterations have been made in the doctrine of lapse. Lapse is the failure of a testamentary gift by the death of its object in the lifetime of the testator. Where the interest given is circumscribed by the life of the deceased devisee or legatee, or depends upon a circumstance which is personal to him and which has not occurred (as his attainment of the age of twenty-one), the gift necessarily fails; and though the interest should be capable of transmission to his representatives, yet, as it never vested in him, his heirs, executors, or administrators could take it only by force of special words of substitution. If the whole and absolute interest was given, then, under the old law, the death of the devisee or legatee caused an intestacy as to the subject of the lapsed gift, unless it were personal property and the will also contained a residuary bequest; if less than the whole and absolute interest was given, then the expectant dispositions, if any, were accelerated. Thus, if Blackacre was devised to A., who died before the testator, in fee, and the residue of the real estate was devised to B., Blackacre did not fall into the residue, but descended to the testator's heir; while, if a lease for years, or any other subject of personal estate, was bequeathed to A., who died before the testator, and the residue of the personal estate was bequeathed to B., the subject of the lapsed bequest fell into and passed as part of the residue to B. But if real or personal estate was given to A., who died before the testator, for the life of B., and, on the death of B., to C., then the remainder to C. took effect immediately on the testator's death (and, unless the case were within the provisions about to be noticed as to children and issue of the testator dying in his lifetime, would still take effect) as an immediate gift in possession, notwithstanding B. should survive the testator. So, if Blackacre was devised to A., who died before the testator, in tail, and on failure of his issue to B., the devise to B. took effect presently, notwithstanding A. left issue who survived the testator. Such was the general state of the law, which has been altered as to real value, by enlarging the operation of a residuary devise, and by carrying out the intended effect of a devise in tail; and, as to both real and personal estate, by attributing new force to gifts in favour of the testator's children or his more remote issue.

Old law.

Lapsed and void devises, present law.

Under the present law, if a devisee in fee of specific lands die in the testator's lifetime, the estate comprised in such

lapsed devise, instead of devolving on the heir, passes to the residuary devisee (*y*); and so, generally, the property or interest comprised in every devise, lapsing or incapable of effect from any cause whatever, falls into the residue of the realty. The result of this alteration, taken in connection with the extension, already noticed, of the disposing power to after-acquired lands (*z*), is, that a testator, whose will contains a complete and operative general or residuary devise in fee, cannot die intestate in regard to any portion of his real estate. Hence there can no longer be any occasion for a subsequent adoption or recognition of the will, in order to extend the operation of a general or of a residuary devise to real estate bought or otherwise acquired since the execution of the will, or comprised in any devise which has lapsed by the death of a devisee in fee.

Devises in tail of realty.

The other alterations in the doctrine of lapse are confined to particular cases. The devise for an estate tail in realty to any person dying in the testator's lifetime is made to take effect if any issue in tail be living at the time of the testator's death (*a*).

Devises and bequests to the testator's issue.

The remaining enactment, under this head, provides, that an interest in real or personal estate, given to a child or other issue of the testator himself, dying in the lifetime of the testator, leaving issue, shall, if any such issue—and the word *such* does not necessarily refer to the *very* issue left by the deceased devisee or legatee (*b*)—should survive the testator, not lapse, but belong to the representatives of the child or other issue to whom the devise or bequest purports to be made, as part of his or her own real or personal estate (*c*); and, as such, it will be subject, of course, to the testamentary disposition, if any, of the same child or issue—provided, as to real estate, the will of the child or issue be within the statute, and consequently of force to pass after-acquired real estate—notwithstanding that such disposition may have the effect of wholly excluding the issue required, by this enactment, to be living at the death of the testator. Of course, where the will itself disposes prospectively, in the event which has happened, of the interest of the deceased child or issue, the operation of the statutory provision is excluded.

Effect of the rules as to lapse.

In both the preceding cases, of the gift in tail, and of the gift to a child or other issue of the testator, the statute places

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(*y*) Sect. 25. (*z*) Sect. 3.

(*a*) Sect. 32. And this provision is now extended to entailed interests in personalty. See notes to sect. 32.

(*b*) See p. 68.

(*c*) Sect. 33.

the persons claiming under the intended devisee or legatee in the same situation as if such devisee or legatee, instead of dying before, had died immediately after the testator.

Their inapplicability where the gift is to a class.

But neither of the provisions in question can apply where the requisite of surviving the testator is involved in the very description of the objects, and where, consequently, nothing can lapse by the death of an individual in his lifetime, as in the case of a gift to "sons," "daughters," "children," or "grandchildren," as a class, for there, according to the established rules of construction, sons, daughters, children, or grandchildren dying before the testator, would be considered as not originally within the contemplation of the gift (*d*). It follows, therefore, that where a testator gives his property to a class (for example, to his children equally), and wishes that in case of the death of any child, his or her children (*i.e.* the testator's grandchildren) should be substituted, there should be inserted express words under which the grandchildren would take by substitution; otherwise any child dying in the testator's lifetime would never come within the class, and would consequently take nothing. But where a testator gives property to his children *nominatim*, and one dies in his lifetime (*e*), the subject-matter of the gift will form part of the estate of the deceased child, subject to the dispositions of his will and to his debts.

VII. As to the construction of wills.

The policy of legislating on such matters questioned.

VII. We now approach the most questionable part of the statute, the construction clauses (*f*): questionable, both as regards the general expediency of legislating on such subjects, and as regards the frame of these clauses in particular. An Act of Parliament is but a blind expositor of legal instruments—objects too minute for its comprehensive vision; and the interpreting, for all future testators, of a few phrases, gleaned from bygone cases of ignorance and mistake, seems not less unbecoming the dignity than it is foreign to the functions of a

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(*d*) In such cases, if the testator, by a codicil, revokes the gift as to one member of the class, the others take the whole, *Shaw* v. *M'Mahon*, 4 Dr. & War. 431; *Boulcott* v. *Boulcott*, 2 Drew. 25; *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129; *Re Palmer*, [1893] 3 Ch. 369; 62 L. J. Ch. 988, overruling *Humble* v. *Shore*, 7 Hare, 247; 33 L. J. Ch. 188, n. See also *Re Parker*, [1901] 1 Ch. 408; 70 L. J. Ch. 170; *Re Allan*, [1903] 1 Ch. 276; 72 L. J. Ch. 159; *Re Wand*, [1907] 1 Ch. 391; 76 L. J. Ch. 253; *Re Dunster*, [1909] 1 Ch. 103; 78 L. J. Ch. 138; *Re Whiting*, [1913] 2 Ch. 1; 82 L. J. Ch. 309; *Re Wilkins*, [1920] 2 Ch. 63; 89 L. J. Ch. 507.

(*e*) Leaving issue who survive the testator (sect. 33).

(*f*) Sects. 29, 30, 31.

great legislative body. In framing documents, for which the legislature has evinced such critical anxiety, we shall be apt either to lose sight of the enacted signification, or to be perplexed between our preconceived notions of the force of a word and its statutory sense. Happily, this interference with the rules of construction is limited to a few instances. The conflict of legal doctrines with popular opinion, on one or two of the questions of construction to which this branch of the statute extends, was certainly to be deprecated not only because the rule of law often disappointed the intention, but because the conviction that it did so produced in judges a strong disposition to find some plausible excuse for departing from the strict construction. Hence arose the numerous cases in which devises, without words of limitation, were held to pass the fee, when combined with circumstances affording an inference that the testator meant to give a larger interest than an estate for life, as the use of the word "estate," the imposition of a charge on the devisee, or the introduction of a devise over in the event of the prior devisee dying under age. Hence, too, arose the cases, almost as numerous, in which the question was, whether, in the construction of gifts to take effect on the failure of issue, indefinitely, of a given person, the words referring to the failure of issue were, by force of the context, restrained to import a leaving of issue at the death of that person, or at some other period within the limits of the rule against perpetuities.

Grounds of complaint against the old law.

The rule (*g*) that a general devise did not pass leaseholds for years where there were freeholds to satisfy it is abolished (*h*). The enactment extends to copyholds, but unnecessarily; it having been held that since the statute which dispensed with a surrender to the use of the will (*i*), copyholds would pass under a general devise (*k*), as they would have done before that statute when preceded by such a surrender.

General devise passes leaseholds and copyholds.

The rule which required that an intention to give to a devisee an estate in fee, as distinguished from an estate for life, should be indicated by words of limitation, or by some equivalent expression, is likewise abolished; so that now a devise of a "messuage" or a "close of land" to J. S., without more, will pass the fee, unless a contrary intention appear (*l*).

Indefinite devise passes the fee.

The statute also provides that words referring to a failure of issue shall, unless the context requires a different construction, be held to import a failure of issue at the death, and not, as

Construction of words importing a failure of issue.

(*g*) *Rose* v. *Bartlett*, Cro. Car. 292.
(*h*) Sect. 26; *Re Holt*, [1921] 2 Ch. 17; 90 L. J. Ch. 410.
(*i*) 55 Geo. 3, c. 192. (*k*) *Doe* v. *Ludlam*, 7 Bing. 275.
(*l*) Sect. 28.

formerly, a failure of issue at any the remotest period (*m*). The effect of this statutory modification of the rule may be illustrated, in regard to both real and personal estate, by the simple case of a gift of real and personal estate to A., and if he shall die without issue, then to B. in fee; here, supposing the will to have been made before January 1, 1838, when the statute came into operation, A. would take (the words "without issue" being construed, according to the old law, to import an indefinite failure of issue) an estate tail in the real estate (*n*), with remainder to B. in fee, while the whole interest in the personal estate (which is incapable of an entail) would belong to A. absolutely (*o*). Whether, therefore, A. had any issue or not, the gift to B. would fail, as regards the personal estate; and it might by the act of A., *i.e.*, his enrolled conveyance (*p*), be defeated, as regards the real estate. If, however, the gift in question occurred in a will made on or after January 1, 1838, then (the words "without issue" being construed, according to the present law, to refer to a leaving of issue at the death) A. would take the fee of the real estate, and the whole interest in the personal estate, but defeasible, as to both, by his dying without leaving issue living at his death, in which event B. would become entitled by way of executory devise or executory bequest, notwithstanding any act of A.

Old law.

Present law.

Construction of devises to trustees.

The provisions for ascertaining the effect of devises to trustees (*q*) are of a purely technical character. They were intended to relieve the expositors of wills from a most embarrassing portion of their duty. The doctrine that no greater quantity of legal estate should be taken by trustees, under an indefinite devise, than was sufficient for the purposes of the trust, though bearing *prima facie* the appearance of reason, rendered it nearly impossible to say, without a judicial decision, what quantity or quality of legal estate was, in certain cases, actually vested in them; and though in some of the reported cases it may have been decided negatively, that the whole fee

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(*m*) Sect. 29.

(*n*) *Doe* v. *Ellis*, 9 Ea. 382.

(*o*) *Donn* v. *Penny*, 19 Ves. 545.

(*p*) 3 & 4 Will. 4, c. 74 (*England and Wales*); 4 & 5 Will. 4, c. 92 (*Ireland*).

(*q*) Sects. 30, 31. Having regard to the period of time which has elapsed since the Wills Act came into operation, the references to cases upon wills made before 1838, which appeared in this place in the 10th and previous editions, have since been omitted. In the case, moreover, of a will coming into operation after 1925, trustees will in all cases take an estate in fee simple or for a term of years absolute under sect. 1 (1) of the Law of Property Act, 1925.

was not vested in the trustees, yet it would be difficult to express, by any technical phrase, what precise estate they were considered to have taken. The difficulty is now transferred to the statute-book.

Operation of the Act upon specific devises and bequests.

As the enactment which makes testamentary dispositions speak and take effect, with respect to the property (not to the objects) comprised in them, as if the will were actually executed the instant before the death of the testator (*r*), was hardly requisite to complete the dominion over after-acquired property, both real and personal estate having been already placed (*s*) on that liberal footing whereon personal estate alone formerly stood, this enactment may be considered as having, for the most part, a distinct object, and as designed to communicate a novel effect to one species of gift, namely, specific devises and bequests, at which it seems to be tacitly aimed. Cases sometimes occurred, under the old law, in which, between the date of the will and the death of the testator, the identical subject of a specific bequest had been removed or destroyed, but other property, equally answering the description, had been substituted. In such a case, without republication of the will, the legatee would not, under the old law, have been entitled to the substituted property (*t*), but he will take it by the operation of the present Act unless a contrary intention appears. If the very subject of property should be gone, but the testator should have, at the time of his death, another subject to which the words apply, that subject will pass : the statute imputing to the testator an intention to make this new application of his words, unless he manifests a contrary intention on the face of the will. A testator, intending that a specific gift shall pass no other subject of property than that which answers the description at the execution of the will, should make such his intention apparent.

As to the effect of the present law with regard to the forms of wills.

In these accessions to the testamentary power and changes in the rules of construction, however important, there is nothing to excite apprehension in the mind of the draftsman, lest, by essentially affecting the forms of wills, they should oblige him to unlearn the old and acquire a new testamentary language. These rules of construction may, on the one hand, dictate caution in regard to the intended scope of general as well as of specific devises and bequests; and, on the other hand, induce the framers of wills either to withdraw their attention from some points which used formerly to exercise it (such, for instance, as the expressing, in general or residuary devises or bequests, of an intention to exercise general powers of appointment; the

(*r*) Sect. 24. (*s*) Sect. 3. (*t*) 1 Rop. Leg. 179.

mention of leaseholds in a general or residuary devise, intended to comprise lands of that tenure; and the insertion of words of limitation in devises intended to pass the fee), or to direct their attention to those points from other motives or for other purposes. As, under the present law, the consequence of silence, in these instances, is to pass the subject of the power, the leaseholds, or the fee, a contrary intention, if entertained, should be distinctly expressed. And it is always to be remembered, that the context of the will may raise an argument for excluding the application of the rules of construction propounded by the legislature. A testator's meaning and intentions are to be gathered from the whole of his will taken together, and those intentions will be carried out by the Court, even though some expressions have to be discarded or modified, and others to be supplied by implication (*u*). And in order to determine a testator's meaning, the Court must read his language in the sense which he himself appears to have attached to it; with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator, by his will, has beyond all doubt excluded such construction (*u*).

Testator's meaning to be gathered from the will as a whole.

Scotland and colonies not within the statute.

The statute expressly excludes Scotland from its purview (*x*); and, by the general law, such of our colonial dependencies as have not imported or adopted this statute, either generally as part of the laws of England, or specially, are also unaffected by its operation.

Donatio mortis causa.

The statute does not apply to a *donatio mortis causa* (*y*). But where the circumstances indicate an intention to make a testamentary gift, and the intention fails for want of proper attestation, a *donatio mortis causa* will not be presumed (*z*).

These observations do not profess to exhaust the subject. They purposely leave many points of secondary interest wholly untouched. But they exhibit (or they have failed of their

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(*u*) *Towns* v. *Wentworth*, 11 Moo. P. C. 526. See also *Re Cheadle*, [1900] 2 Ch. 620; 69 L. J. Ch. 753.

(*x*) Sect. 35.

(*y*) 1 Rop. Leg. ch. 1; *Moore* v. *Darton*, 4 De G. & S. 517; 20 L. J. Ch. 626.

(*z*) *Re Patterson*, 12 W. R. 941; 51 L. J. Ch. 1. See also the notes to *Ward* v. *Turner*, 2 Ves. S. 431, in 1 Wh. & Tud. L. C. Eq.; *Hewitt* v. *Kaye*, L. R. 6 Eq. 198; 37 L. J. Ch. 633; *Re Beak's Estate*, L. R. 13 Eq. 489; 41 L. J. Ch. 470; *Moore* v. *Moore*, L. R. 18 Eq. 474; 43 L. J. Ch. 617; *Rolls* v. *Pearce*, 5 Ch. D. 730; 46 L. J. Ch. 791; *Re Mead*, 15 Ch. D. 651; 50 L. J. Ch. 30; *Treasury Solicitor* v. *Lewis*, [1900] 2 Ch. 812; 69 L. J. Ch. 833.

object) the broad features of the law—much less, indeed, than it behoves the professional adviser to learn and meditate, but all, or nearly all, that it concerns the general reader, and even the general practitioner, to know.

We may now close, not unprofitably, we trust, our view of this statute, by suggesting that testators should reconsider their wills, from time to time, as important changes affect the state of their property or the objects of their bounty, and rather endeavour to provide for events as they arise, than rely on the prospective care either of themselves or of the legislature; by deprecating, as more or less perilous, all attempts to engraft alterations of intention on previous testamentary papers, whether by interlineation or obliteration or by codicil, and all attempts to incorporate, by reference, the contents of ledgers, journals, or other detached writings; by cautioning both testators and their advisers against the too confident assumption of the responsible, morally responsible, office of a will-maker, in cases of magnitude and difficulty, which often try the gravest experience; by urging upon unprofessional persons the good sense, duty, and economy of taking regular advice, in a matter that involves, perhaps, all their hard-earned gains, all their tenderest affections—nor less upon professional men, who may have acquired some repute by framing or advising on the wills of others, the folly of jeopardising it by making their own (*a*);

(*a*) See *Medlycott* v. *Jortin*, 2 Br. & B. 632; a case upon Mr. Sarjeant Hill's will, which was so singularly confused, that, but for the respect due to the very learned Serjeant, it might, not unreasonably, have been held void for uncertainty. The will of Sir Samuel Romilly was also inartificially penned, and that of Chief Baron Thompson was the subject of Chancery proceedings. So also were the wills of Holt, C.J., Viner's Ab., *Apportionment*, p. 18; Eyre, C.J., *Gower* v. *Eyre*, G. Coop. 156; Mr. Serjeant Maynard, *Earl of Stamford* v. *Sir John Hobart*, 3 Br. P. 31; Vernon, the eminent Chancery Counsel, *Acherley* v. *Vernon*, 1 P. W. 783; Mr. Baron Wood, *Baker* v. *Bayldon*, 31 Be. 209; Mr. Justice Vaughan, *Knight* v. *St. John*, *coram* Wood, V.-C., 1862; Francis Vesey, Jun., the reporter, *Vesey* v. *Vesey*, *coram* Kindersley, V.-C., 1862; Richard Preston, the conveyancer, *Whyte* v. *Preston*, *coram* M.R., 1862; Lord Chancellor Westbury, *Bethell* v. *Abraham*, L. R. 17 Eq. 24; 43 L. J. Ch. 180; Lord Chancellor Cottenham, *Cottenham* v. *Pepys*, *coram* M.R., 1881; and Mr. Baron Cleasby, *Cleasby* v. *Cleasby*, *coram* Hall, V.-C., 1881. Saunders, C.J., appears to have made a speculative devise, upon the validity of which his executors, Maynard, Holt, and Pollexfen, all great lawyers, were divided in opinion (4 R. P. Com. Rep. App. 24). The will of Bradley, the celebrated conveyancer, was set aside by Lord Thurlow for uncertainty (Martin's Conv. Recital Book, 35, n.). Lord Thurlow's own will did not contain any power to appoint new trustees, and the omission was supplied by Act of Parliament. The will of the late Dr. Tristram, author of a work on Probate

and (if we may be allowed to mingle, yet further, morals with our law) by condemning all whimsical, ostentatious, and splenetic schemes of disposition,—the singularity which departs from ordinary and approved modes where nothing peculiar exists; the vanity which, regardless of near and known connections, provides for remote generations a vast estate and an obscure name (*b*); the charity which reserves itself for posthumous admiration; resentments that sleep not in the grave; finally, addressing to all who have disposable property this admonition—to settle their affairs at leisure and in health, while there is yet a sound mind in a sound body, that so they may die, not only testate but advisedly justly and wisely testate.

Practice, was imperfectly executed, and the will of Lord St. Helier, late President of the Probate Division, was only admitted to probate after an action, *St. Helier* v. *Jeune* (1905), 119 L. T. Journal, 157.

(*b*) The most remarkable modern instances are afforded by the wills of Thellusson (see *Thellusson* v. *Woodford*, 4 Ves. 227; 11 Ves. 112; *Oddie* v. *Woodford*, 3 M. & C. 584; 7 L. J. (o.s.) Ch. 117; *Thellusson* v. *Robarts*, 5 Jur. (N.S.) 1031; *Thellusson* v. *Rendlesham*, 7 H. L. C. 429; 28 L. J. Ch. 948) and Bengough (*Bengough* v. *Eldridge*, 1 Sim. 173; 5 L. J. Ch. 112; *Cadell* v. *Palmer*, 10 Bing. 140; 7 Bli. (N.S.) 200). With respect to Thellusson's scheme, the enormous accumulation once anticipated, which seemed almost to threaten the equipoise of the State, vanished in chancery management, &c.; and as Parliament had interposed by a public Act (39 & 40 Geo. 3, c. 98) to limit accumulation, so it interposed by a private Act (3 & 4 Will. 4, c. xxvii.) to correct, in some degree, the particular mischief. Bengough's will, which was settled by Mr. Preston, and contained directions for a funeral with civic honours and a costly monument, was established after a vigorous contest, by a judgment of the House of Lords (7 Bli. (N.S.) 202).

SUGGESTIONS

TO

PERSONS TAKING INSTRUCTIONS FOR AND PREPARING WILLS.

Of all the duties which devolve upon the legal practitioner, none, perhaps, so imperatively demands the exercise of a wise discrimination as that of taking instructions for and preparing a will. Intending testators too often postpone the testamentary act until they are prevented by disease or physical weakness from explaining in detail to their professional adviser the situation of themselves, their family, and their property, and to the discretion of that adviser the particular provisions of the instrument are left. Indeed, many persons are ignorant of the ordinary modes of disposition under similar circumstances of family and property, and require to be advised as to the plan best adapted to those circumstances; and he who would efficiently discharge this important branch of a lawyer's duty should be prepared with some sound and well-considered notions on the subject. This perhaps will be facilitated by suggesting some of the particulars on which accurate information should be obtained in taking instructions for a will, and by pointing out briefly the comparative advantages of the several modes of testamentary disposition adapted to ordinary circumstances.

It is obvious that the nature of the inquiries in every case must be greatly regulated by the situation in life and other circumstances of the intending testator. It is equally obvious that on the part of the latter there should be that full confidence which induces him to explain his position to his professional adviser without concealment and without reserve.

In the course of a judgment in a will case (*c*) in 1885, Mr. Justice Pearson said: "I cannot part with the case without expressing an opinion which I have entertained for a great many years (and which the experience of the last three weeks in this Court has most strongly confirmed), that I regret exceedingly that not only ordinary laymen, but, as it seems to me, professional men, do not understand the great difficulty there is in

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(*c*) *Re Wait*, 30 Ch. D. 617, 622; 54 L. J. Ch. 1172.

drawing wills, and do not bestow a little more care and pains in endeavouring to draw them in such a way as that the numerous questions which often arise on them should be avoided. I regret to say that these questions often throw a great deal of expense on parties interested under the wills, and are the cause of great heartburnings and most bitter animosities. . . . Very often a will is most carefully drawn, so far as the phraseology goes, but either the person who draws it is improperly instructed, or in some other way a mistake is made which creates difficulty and worse than difficulty. During the last three weeks I have disposed of not less than thirty will cases in which questions have arisen through some mistake."

Instructions, from whom to be taken.

1. Instructions for a will should, if possible, be taken from the testator himself, rather than from third persons, especially where such persons are interested.

Inquiries as to matters personal to the testator.

2. Full inquiry should be made as to the personal position of the testator himself, of his family, and of the objects of his bounty (*d*).

Is the testator legitimate or illegitimate? Is he married or unmarried? If married, when, and was a marriage settlement executed? Is there any doubt of the fact or of the legality of his marriage, or of the legitimacy of any of his children or other objects of his favour? Is there a probability of the birth of other children? Is there any question as to the place of domicile of the testator, or of any of the objects of his bounty? Is the testator engaged in trade, in partnership either in his general business or in a particular adventure?

Nature and extent of testator's property.

3. Full inquiry should be made as to the nature and extent of the testator's property.

Where is the realty (if any) situate? Is it freehold or leasehold? What is the precise interest of the testator therein, and how did he acquire it? Is any of it mortgaged? If so, is the mortgaged estate to bear the burden in exoneration of the residuary estate (see note (*a*), Prec. 16)? Has the testator contracted to sell or buy any real estate? Is any of the realty to be specifically devised? Are the rents current at the testator's death to be apportioned or to belong wholly to the devisee? Has the testator any powers of appointment? Is any provision to be made for carrying on his trade? Is any special fund to be appropriated for the payment of debts and legacies?

(*d*) The testator should be warned, if necessary, that scandalous and defamatory words are liable to be directed to be omitted from the probate, *In b. Robert White*, [1914] W. N. 228. Matter objected to by the military authorities may in certain circumstances be similarly omitted. *In b. Heywood*, [1916] P. 47; 85 L. J. P. 24.

Is he a shareholder in joint-stock companies? Is he tenant in tail in possession of property which can be disposed of under sect. 176 of the Law of Property Act, 1925 (see note to sect. 3 of the Wills Act, *ante*)?

Let it now be supposed that the person taking instructions for the will has fully and accurately acquainted himself with the situation of the testator's family and other intended objects of his bounty, and of the property upon which his will is designed to operate.

I. As to the objects of gift.

Objects of gift.

Where a testator is married but has no child, provision should nevertheless be made for children hereafter to be born (unless it is unreasonable to contemplate his having children by his present wife), or the will should expressly be made contingent on his leaving no issue surviving him. Similarly, provisions for the children of a married testator should not be confined to those *in esse* at the date of the will.

Provision for widow.

An immediate legacy to the widow, to defray the current expenses of the family, is generally proper. In making a permanent provision for the widow, it is to be considered whether the testator will give her a life income only, or an absolute transmissible interest in any portion of his property. The former mode of provision seems in general most consistent with testamentary arrangements, especially where there are children, whom the testator commonly intends to take ultimately the bulk of his property. Indeed, even the life interest of the widow is frequently made to cease on her marrying again, where the testator has children, to whom such an event might be prejudicial; otherwise the restriction is not ordinarily to be recommended.

Widow's position in regard to testator's children.

If any of the testator's children are minors, or are otherwise incapable of providing for themselves, it is advisable to charge the widow (if she takes a life interest in the whole property) with the obligation of maintaining them, unless the testator feels himself secure in leaving this duty to the spontaneous exercise of parental affection. It may sometimes be desirable also to confide to the widow, when she takes only a life interest, and there is a gift over to children equally and absolutely, a power *by will* to regulate and modify the shares of the children so as to adapt them to any change of circumstances occurring in her lifetime; and such power, if confided, should extend to enable the donee to appoint to more remote issue; for various circumstances (such as the bankruptcy, imprudence, or mental

imbecility of a child) might render it advisable to exclude him from any share, and substitute his issue as objects of the testator's bounty. Another salutary effect of such a power is that it imposes some check on the sale or mortgage by the children of their reversionary interests.

If it is deemed advisable that the children should take some benefit in possession during their mother's lifetime, a certain portion of their shares, say one-half or a third, may be made to vest in possession at majority or marriage in the lifetime of the widow, or, which is more common, a pecuniary legacy may be given to them, payable at majority or marriage; and this more especially deserves consideration, if the children's shares are made contingent (but this is seldom advisedly done) on their surviving the testator's widow, and she has no power of appointment by deed or of advancement, as she would then be unable to accelerate the payment of the children's shares.

Provisions for children.

The mode of providing for children is of course a more fertile, and therefore more difficult, topic of remark; but, before offering any suggestion on this head, it should be observed that, where a testator is about to provide for his wife and children, it should be ascertained whether they take any and what interests under any marriage or other settlement of the testator, which may greatly influence the dispositions in the will. Testators often treat settled property as their own; and the assertion by some of the legatees of their claims under the settlement deranges the testamentary scheme, and gives rise to nice questions concerning the doctrine of election.

As to the advancement of, and loans to, children.

Another point to be ascertained is, whether any of the children have been or are likely to be advanced by the testator in his lifetime, and whether such advancements are to be deducted out of their shares, and whether any children to whom money may have been advanced by way of loan are to be treated as debtors of the estate in respect of such advances or not.

Period of vesting of children's shares.

The shares of sons are in general made to vest absolutely at majority, and those of daughters at majority or marriage; and the advantage of this plan is, that, if they afterwards die during the life of the widow (whom we suppose to take a life interest), the provision does not fail by such event, but devolves upon their personal representatives. If the vesting of the shares is postponed until the death of the widow, care should be taken that the issue of such of the children as antecedently die are made to stand in their parent's place, though even this is less eligible than making the shares vest at majority or marriage; because, by the latter plan, a child marrying in the lifetime

Postponement of vesting until widow's decease, inexpedient.

of the widow is enabled to make a settlement upon, and to communicate a benefit to, the objects of such marriage.

Where all the intended objects are adult, and are to take absolute shares, the will may be very simple in its form, as the disposition in favour of the children will consist of a mere absolute trust; and, indeed, unless the widow takes a previous life or other temporary interest, there will be no occasion for any trust at all. The whole of the testator's property may be given to his children, in equal or (as the intention may be) unequal shares.

Mode of providing for married daughters.

Where, however, any of the children are daughters who are married, it is generally advisable that their shares should be subjected to such trusts as will take them out of marital control. If the matter is left to the operation of the Married Women's Property Act, 1882, or if the share in question (supposing it to be personal estate) is simply given in trust for the daughter for her separate use absolutely, the effect is to authorise the executors to pay or transfer the fund or property to the daughter, without the concurrence of the husband; but this does not prevent the daughter herself from handing it over to the husband, so that the testator's object is but inadequately attained. In order effectually to exclude marital influence in the affair, the power of the daughter herself must be curtailed; to effect which it is usual to vest the property in trustees for the daughter during her life, and while married, for her separate and inalienable use, and, after her decease, in trust for her children or more remote issue as she shall appoint; and, in default of appointment, in trust for her children equally; and, in default of children, in trust for such persons as the daughter shall by deed or will appoint; and, in default of appointment, for the persons who would be beneficially entitled on her intestacy. A trust for children, however, is not essential to secure the property as an inalienable provision for the daughter. If it is intended to give her all the control which is consistent with this object, the trust should be for her separate and inalienable use during coverture, with remainder to such persons as she shall by deed or will appoint; and, in default, to the persons who would be beneficially entitled on her intestacy: in which case, of course, the property is effectually devoted to the prescribed trusts during the coverture of the daughter, after the expiration of which (the restraint on anticipation being at an end) she would be able, by an exercise in her own favour of her power of appointment by deed, to acquire the absolute interest, and entitle herself to call for a transfer of the fund. Sometimes the power is confined to appointment by will, with

Trusts for separate use.

the view of precluding an irrevocable appointment in favour of a husband or any other person.

As to unmarried daughters.

Similar trusts should be created of the shares of unmarried daughters, unless the testator can confide to their prudence the task of making proper settlements for themselves on marriage.

With respect to unmarried daughters, however, it is not in the power of the testator to make a life provision absolutely inalienable, as the legatee, if unmarried at the death of the testator, or at any subsequent period, may, while sole, disregard any restriction on the anticipation of her life interest, though the testator may of course visit such act with the penalty of forfeiture; but this is a strong measure, and not in ordinary cases to be recommended. The trusts adapted to coverture, unless defeated by a positive act on the part of the daughter herself, while sole, will take effect when such coverture occurs.

As to giving life interests to husbands of daughters.

A testator may choose to give to the surviving husband of a daughter, whose share after her decease is settled on her children a life interest in the property, or (which seems better) to empower the daughter herself to limit such an interest; and if this power is made exercisable by will only it has the effect of securing to the daughter a degree of influence during her life, as the power cannot be irrevocably exercised.

Powers to trustees to settle shares of daughters marrying during minority.

Sometimes it may be proper to give to trustees a power of settling the shares of children who marry during minority, especially in the case of a daughter who has a reversionary share in a money fund; in such a case it was not, until recently, in the power of either of the marrying parties, even though the intended husband was adult, to make an absolute settlement, as his marital interest (which, if the fund was an interest in possession, would render the settlement effectual) was subject to the wife's contingent right of survivorship, which her minority prevented her from binding before, and her coverture after, the marriage. But now that, by the 18 & 19 Vict. c. 43, male infants not under twenty, and female infants not under seventeen, can, with the sanction of the Chancery Division (to be obtained by summons, without the institution of a suit), make a valid and binding settlement upon or in contemplation of marriage (*e*), there is less necessity for investing trustees with discretionary powers of making settlements of the shares of daughters marrying during minority.

18 & 19 Vict. c. 43.

Gifts to a reputed wife or to illegitimate children should be given free from legacy duty; and in providing for the latter

(*e*) Whether an infant can make a post-nuptial settlement, *quære*, *Re Sampson and Wall*, 25 Ch. D. 482; 53 L. J. Ch. 457; *Seaton* v. *Seaton*, 13 App. Cas. 61; 57 L. J. Ch. 661.

persons, care should be taken to dispose of the property in the event of their death during minority, or without having themselves effectually disposed of the same.

If any of the legatees are debtors to the testator, it should be shown whether the debts are to be brought into account; and if any of them are creditors of the testator, whether the legacies are to go in satisfaction of their claims.

It is often convenient to authorise the payment of legacies which may be small in amount to the parents or guardians of infant legatees, with a direction that the receipts of those persons shall discharge the executors or trustees. And generally the investment of legacies belonging to minors should be authorised instead of leaving the executors to pay them into Court under the Trustee Act, 1925, s. 63 (15 Geo. 5, c. 19).

II. As to the subjects of gift. Subjects of gift.

It remains to be considered what are the modes of disposition best adapted to various species of property.

Household goods and other perishable articles should, in general, be given to the immediate takers out and out. It is seldom intended that they should be sold; and the creation of life or other partial interests in such property is attended with much inconvenience. Where such partial interests are bequeathed, it should be ascertained whether the temporary possessor is to give any security to the ulterior taker for the preservation of the chattels in question. The creation of a partial interest in live stock is also objectionable, on account of the difficulty of regulating the precise mode of enjoyment, and of adjusting the relative claims of the immediate and ulterior takers (*f*). It is better either to give such property absolutely in possession, or, if the testator wishes to create a life interest, to direct the stock to be sold, and the proceeds invested, and the income to be paid to the intended legatee for life, the capital being made divisible at his death. Household goods, &c. Live stock.

Where the general residue of personal estate is given to a person for life, it should be distinctly ascertained and shown whether the legatee is to enjoy the use or income of the property in its actual state, or whether it is to be converted, and the proceeds invested upon Government or real securities. This is especially important where any part of the property is of a wasting or deteriorating nature, as annuities or leaseholds of short duration, since property of this description obviously throws Trusts for conversion.

(*f*) See *Paine* v. *Warwick* (*Countess*), [1914] 2 K. B. 486; 83 L. J. K. B. 895.

into the hands of the immediate taker a larger income than an investment of the proceeds would yield. On the other hand, if any part of the residue consists of reversionary or other future interests, the case is reversed, and the legatee for life is the person interested in requiring an immediate sale. A want of explicitness as to this point has occasioned much litigation. In general, where the purposes of the will require (as they commonly do) that some part of the residuary property should be sold, the best course is to subject the whole to a trust for sale and conversion, and to give the trustees a discretionary power of continuing the property in its actual state so long as they may deem it expedient so to do, and of paying the income to the persons who would be entitled to the interest of the invested fund. A power to postpone sale will, unless a contrary intention appears, be implied after 1925 in every trust for sale of land (Law of Property Act, 1925, s. 25).

Suggestions where property is subject to incumbrances.

If any of the estate is in mortgage, it should be ascertained whether the devisee or legatee is to take it exonerated from the incumbrance; the law being that, in the absence of any evidence of intention to the contrary, the residuary estate is not applicable in discharge of the mortgage, but the devisee or legatee takes the estate or property *cum onere*; and a direction that the testator's debts be paid out of his personal or residuary estate is insufficient to exonerate the mortgaged estate, unless the direction refers expressly or by necessary implication to all or some part of the charge. When a testator subjects his real estate to debts, legacies, or annuities, it should be ascertained and distinctly indicated whether he intends to make the land the primary fund, or merely that it should supply any deficiency in the residuary estate. The latter would be presumed where the contrary does not appear; but obscurity on the point has been a prolific source of litigation.

Whether the vesting or the enjoyment only is to be postponed.

Another and very important suggestion is, that whenever the enjoyment of the subject of gift (whatever be its nature) is postponed to a period subsequent to the testator's decease, it should be ascertained whether the vesting is also to be deferred; in other words, whether the devisee or legatee is immediately to take such an interest as will pass to his representatives in the event of his dying before the period of enjoyment. Where the vesting is postponed until majority, or any other period, the destination of the income in the meantime should be provided for.

Discretionary powers of trustees.

The extent of the discretionary authority of trustees is always a point upon which a testator's intention should be carefully

ascertained (*h*). The nature of the powers adapted to various circumstances will be collected from the Precedents. Liberality, without excessive indefiniteness, is the desideratum. If special and onerous duties are imposed on trustees, a large discretion should be confided, and, in such cases, a pecuniary allowance for the extraordinary trouble of management may be a prudential measure. This remark particularly applies where executors are directed to carry on a business, as such a duty involves a greater amount of risk and trouble than can be fairly exacted from the gratuitous services of a trustee. Even in ordinary cases, a pecuniary legacy to executors for their trouble seems proper, especially if they are strangers, taking no beneficial interest under the will. And here it may be remarked, that, with a view to the protection of the trustees, and the making provision for the due administration of the affairs, the extent of a testator's engagements to third persons, and especially his rights and responsibilities with respect to any partnership concern, or any joint-stock company, in which he may be engaged, may be a proper subject for inquiry and provision.

Testator's engagements and responsibility as partner or otherwise.

III. General suggestions.

General suggestions.

Where real estates are to be specifically devised, it is well to see the title deeds, or an abstract of the recent title. Misdescription, omission of parcels, misstatements of tenure, &c., may thus be avoided; and if the lands are described by their situation and occupancy, it should be seen that the two parts of the description are co-extensive.

Specific devise.

A marriage or other settlement of the testator should be inspected.

Settlement.

If any contract for the purchase or sale of realty is likely to be pending at the testator's death, the destination of the estate or of the purchase-money should be provided for.

Contract for purchase or sale.

If the testator is in partnership, it would be well to examine the partnership articles, to see if they contain any power to be exercised by will.

Partnership.

(*h*) A direction by a testator that a certain person should be employed as agent and manager of the testator's estates, whenever his trustees should have occasion for the services of a person in that capacity, was held not to create a trust which such person could enforce, *Finden* v. *Stephens*, 2 Ph. 142; 17 L. J. Ch. 342; and see *Shaw* v. *Lawless*, 5 C. & F. 129. So, also, a direction that a particular person shall be solicitor to the estate imposes no obligation to employ that person as solicitor, *Foster* v. *Elsley*, 19 Ch. D. 518; 51 L. J. Ch. 275. But see the Public Trustee Act, 1906, s. 11 (2), and Miscellaneous Forms, *post*, p. 349.

Gift to a class.

Where there is an immediate gift to a class, the components of which may not be in existence at the death of the testator, the destination, in that event, of the intermediate income should be ascertained. Moreover, in every gift to a class, the period at which the class is to be ascertained should be made clear beyond the possibility of doubt.

Survivorship.

In all cases where there are limitations to survivors, the period to which the survivorship is to be referred should be most clearly expressed.

Precatory words.

Precatory words, or words of recommendation, should be avoided. If it be intended to impose a legal obligation, a definite trust should be created.

Powers.

General powers vested in the testator over the beneficial interest in realty and personalty will be exercised by a general disposition, unless a contrary intention appears. It should be borne in mind, however, that as to powers, whether general or special, testators may wish the property to go as in default of appointment; and this wish may (especially as regards powers of revocation) be defeated by an unguarded general disposition.

Annuities.

If annuities are given, it should be shown how they are to be raised; whether by the purchase by the executors of a Government or other annuity, or by the appropriation of a particular fund, or as a charge on a particular estate.

Legacy duty.

Annuities, rentcharges, and life interests should be given clear of legacy duty. A saving is effected by giving all legacies clear of duty.

Lapse.

Provision should be made for lapse; and in the case of contingent gifts for the non-occurrence of the contingency.

Trustees' powers.

Powers to trustees of investment, and to vary securities, should be inserted when it is not thought desirable to rely on the powers to invest conferred by the Trustee Act, 1925; as to which, see note (*b*), Prec. 4. The power to apply income for the maintenance of infants, and the common power to give discharges, may now be omitted; but a power to appoint new trustees may or may not be necessary. The common indemnity clauses to trustees are of little or no importance.

Solicitor-trustees.

If a solicitor is appointed an executor or trustee, and it is intended that he should be remunerated, a clause should be inserted entitling him to charge for all work done by him in connection with the executorship or trust, in the same manner and to the same extent as if, not being himself such executor or trustee, he had been employed by the executors or trustees to do such work professionally as their solicitor.

Gifts over.

In limiting gifts over to take effect upon the failure or determination of prior interests, great care should be taken that

the events, upon the happening of which such gifts over are to take effect, should correspond exactly with the events upon the happening of which such prior interests are to fail or to be determined.

Illegitimate children.

In leaving property to children as a class, or otherwise, it should be ascertained that all the children intended to be benefited are legitimate. If any of them are illegitimate, the intention of the testator that they should participate should be clearly expressed.

As to preparing codicils.

Lastly, no person should attempt to prepare a codicil which is intended to revoke, alter, or modify any disposition in the will, or in a previous codicil, without seeing such prior testamentary document, the contents of which are often very imperfectly recollected and stated by the testator.

See, further, Form of Questions to be put to an Intending Testator, Encyclopædia of Forms and Precedents, Vol. 15, p. 392; and *post*, note (*a*) to Prec. 8.

DIRECTIONS AS TO THE EXECUTION OF A WILL.

The will must be signed at the foot or end thereof by the testator, or by some person in his presence and by his direction. If the will consists of several sheets, it is well, though not essential, that the testator sign each sheet, for the purpose of identifying it, and of preventing interpolation.

In addition to the signature at the end of the will, the testator should sign, or cause to be signed, his name or initials in the margin opposite to any interlineation, erasure, or other alterations which may have been made before the execution of the will.

The signature at the end must be made or acknowledged by the testator in the presence of two witnesses present together; and they, immediately thereafter, without separating and without quitting the testator's presence, should sign their names under the attestation clause.

The attestation clause should be written at the end of the will. Before or immediately after the witnesses have thus subscribed their names, they should sign their names or place their initials in the margin opposite to any such interlineation, erasure, or other alteration as is hereinbefore referred to. It is proper, though not essential, that the attestation clause should be read over by or to the witnesses before they subscribe their names.

It must be carefully borne in mind that the execution of the will should be one transaction, and that the testator should be in such a position as that he might see the witnesses in the act of attesting and subscribing his will.

No person to whom or to whose wife or husband any beneficial devise or bequest is made by the will should be an attesting witness, for thereby such devise or bequest is rendered void, and a trustee who is a solicitor and is authorised by the will to charge professionally is precluded from doing so if he attests the will. See notes to sect. 15 of the Wills Act, *ante*, p. 32.

No alteration whatever should be made in the will after it is executed; any change should be effected by a new will or by a codicil, which must be executed in the same way as a will is required to be executed.

It is highly desirable, though not absolutely essential, that

the witnesses should be aware of the testamentary character of the instrument.

To facilitate the proof of the will, the occupation and place of abode of each witness should be added.

PUNCTUATION.

Punctuation.

It is well known that from legal instruments punctuation and parentheses are excluded; or, if admitted, that they are disregarded in the construction of the instrument. Stops, though used in the printed copies of Acts of Parliament, are omitted from the Parliament rolls. The absence of stops from conveyances, and the framing of the sentences so as to be independent of their aid, has been attributed to the natural desire that everyone must feel that the title to his estates should not depend on so trivial a circumstance as the insertion or omission of a comma or semi-colon (*i*); while the necessity of expressing the meaning unequivocally, without the aid of such marks, has been alleged as one cause of the apparent tautology and verboseness of legal instruments (*k*). It would seem, however, that, in construing wills, marks of punctuation occurring in the original (*l*), parentheses, capital letters, &c., may be taken into consideration. But it is from the words and the context, not from the punctuation, that the testator's meaning is to be collected; though where the words are of doubtful meaning, the punctuation and other circumstances may be referred to for the purpose of assisting in the explanation (*m*).

Parentheses.

Stops, &c.

The convenient practice of drawing wills in numbered paragraphs—a line being drawn from the last word of a paragraph to the margin, should the last word of a paragraph not reach the margin—has now become common. The forms in this work were first divided into numbered paragraphs in the 14th edition (1919), and the practice is now continued.

(*i*) Williams, R. P., Part I., ch. X. (*k*) 1 Byth. & Jarm. 368.

(*l*) *Oppenheim* v. *Henry*, 9 Ha. 802, n.; and see *Gascoigne* v. *Barker*, 3 Atk. 8; *Banks* v. *Denshire*, 1 Ves. S. 63; *Morrall* v. *Sutton*, 1 Ph. 533; 14 L. J. Ch. 266, as to parenthesis; *Compton* v. *Bloxham*, 2 Col. 201; 14 L. J. (N.S.) Ch. 380; *Child* v. *Elsworth*, 2 D. M. & G. 679; *Gauntlett* v. *Carter*, 17 Be. 586; 23 L. J. Ch. 219; *Manning* v. *Purcell*, 7 D. M. & G. 55; 24 L. J. Ch. 522; *Jebb* v. *Tugwell*, *ib.* 663; *Manchee* v. *Kay*, 3 Giff. 545; as to stops, &c., and the inferences to be drawn from the state of the original instrument.

(*m*) *Sandford* v. *Raikes*, 1 Mer. 646; *Gordon* v. *Gordon*, L. R. 5 H. L. 254; *Houston* v. *Burns*, [1918] A. C. 337; 87 L. J. P. C. 99.

OUTLINE WILL,

With References to Clauses in the Forms.

Note.—The following Outline does not of course contain a reference to all the forms in this book. Nor would the clauses referred to, if successively copied out, make an intelligible will. It is merely intended as an example of the general arrangement of a will and a key to some of the clauses which are frequently required.

1. Beginning. Miscellaneous Forms, p. 348.
2. Revocation. Prec. 2, clause 1; and see note (*d*) to Prec. 1.
3. Appointment of Executors, Trustees, and Guardians. Miscellaneous Forms, pp. 348 *et seq.*
   - wife sole trade executrix. Prec. 19, clause 2.
   - separate trade executors. Prec. 22, clause 2.
   - wife a trustee during widowhood. Prec. 20, clause 2; Prec. 26, clause 2; Miscellaneous Forms, p. 351.
   - trustees for purposes of Settled Land Act. Miscellaneous Forms, p. 348.
   - Colonial trustees. Miscellaneous Forms, p. 353.
4. Confirmation of marriage settlement. Miscellaneous Forms, p. 397.
5. Specific bequests.
   - Furniture and personal effects. Prec. 6, clause 4; Prec. 8, clause 3 and note (*a*) thereto; Prec. 11, clause 15.
   - "Personal chattels." Miscellaneous Forms, p. 362.
   - Stocks and shares. Miscellaneous Forms, p. 367.
   - Proviso against ademption. Prec. 11, clause 34.
   - Bonus to be income. Miscellaneous Forms, p. 368.
6. Pecuniary legacies. Prec. 10, clause 8; Miscellaneous Forms, p. 355.
   - to debtor. Miscellaneous Forms, p. 366.
   - to wife (immediate). Prec. 6, clause 3.
   - to executors. Prec. 8, clause 5; Prec. 12, clause 3.
   - to servants. Prec. 11, clause 17.
   - to charities. Prec. 24, clause 6; Miscellaneous Forms, p. 356.
   - by instalments. Prec. 25, clause 4.
7. Annuities. Prec. 10, clause 7; Prec. 11, clause 29.
   - trustees to purchase. Prec. 5, clause 6.
   - And see note (*f*) to Prec. 5.
8. Specific devises. See Devise in Index.
9. Bequest of leaseholds. Prec. 11, clauses 11 and 12; Miscellaneous Forms, p. 352.
10. Bequest of rents due. Prec. 11, clause 14.
11. Appointment. See notes to sect. 27 of the Wills Act, *ante*, p. 57.
    - realty under a general power. Prec. 9, clause 3.
    - personalty under a general power. Prec. 9, clause 4.
    - personalty under a special power. Prec. 30, clause 3; Miscellaneous Forms, p. 370.

12. Clauses as to carrying on business. See Business in Index.
13. Trust for sale and conversion. Prec. 6, clause 5; Prec. 8, clause 6; Prec. 22, clause 11.
14. Power to postpone sale and conversion. Prec. 6, clause 6.
15. Settlement of daughter's shares. Prec. 18, clause 21.
16. Powers of management. Miscellaneous Forms, p. 393.
17. Investment clause. Note (*b*) to Prec. 4, p. 129; (short form) p. 130.
    power to retain existing investments Prec. 18, clause 19.
    power to retain hazardous investments. Miscellaneous Forms, p. 398.
18. Power to trustees to appropriate. Miscellaneous Forms, p. 395.
19. Power to trustees to determine between capital and income, questions, &c. Miscellaneous Forms, p. 398.
    and to forgive debts. Miscellaneous Forms, p. 367.
20. Clause negativing the Locke King's Act principle. Miscellaneous Forms, p. 399.
21. Clause excluding the rule in *Allhusen* v. *Whittell*. Miscellaneous Forms, p. 396.
22. Clause negativing apportionment of rents. Prec. 18, clause 9; Miscellaneous Forms, p. 399.
23. Payment of legacy duty. Prec. 5, clause 8; Miscellaneous Forms, p. 364.
    General direction that gifts shall be free of duty. Miscellaneous Forms, p. 365.
24. Power to solicitor-trustee to charge. Prec. 23, clause 12; Prec. 28, clause 19.
25. Power to son, who is a trustee, to purchase. Miscellaneous Forms, p. 380.
26. Power to appoint New Trustees. Prec. 6, clause 10; Prec. 11, clause 35; Prec. 15, clause 9.
27. Trustee interpretation clause. Prec. 3, clause 6.
28. Testimonium and attestation clauses. Miscellaneous Forms, p. 401.

CONCISE FORMS OF WILLS (*a*).

NOTE.—See Outline Will for general use, *ante*, p. 116.

PREC. 1.

No. I.

WILL *giving to one absolutely all the Testator's Real and Personal Estate.*

THIS IS THE LAST WILL (*b*) of me [*testator's name residence and quality*]. I DEVISE and bequeath all my real and personal estate unto [*devisee's name residence and quality*] absolutely. I APPOINT the said [*name*] sole executor [executrix] (*c*) of this my will. AND I revoke all other wills and testamentary dispositions by me heretofore made (*d*). IN WITNESS whereof I have hereunto set my hand this day of , 19 .

[*Testator's Signature*]

Form of attestation.

Signed by the above-named testator [testatrix] as his [her] last will in the presence of us present at the same time who in his [her] presence and in the presence of each other subscribe our names as witnesses (*e*).

[*Two witnesses*]

NOTES to Precedent 1.

(*a*) The following forms may be used *mutatis mutandis* for the wills of women, married or single.

By sect. 3 of the Married Women's Property Act, 1893, "section 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband."

See further as to wills of married women to whom the Act of 1882 applies, *ante*, p. 32.

It is clear that as to any married woman, at whatever date she may have married, she may, without her husband's consent, make a will for the purpose of appointing an executor to continue the representation of a prior testator, *Scammell* v. *Wilkinson*, 2 Ea. 552; *Hodsden* v. *Lloyd*, 2 Br. C. 534, 543; but it would seem that the chain of executorship is not necessarily continued by the appointment of an executor by a married woman in a will made under a power, *In b. Hughes*, 4 Sw. & Tr. 209; *In b. Bridger*, 4 P. D. 77; 47 L. J. P 46. Any married woman may also, without her husband's consent, bequeath personalty settled

NOTES TO PREC. 1.

to her separate use, *Fettiplace* v. *Gorges*, 1 Ves. J. 46; and devise or bequeath real or personal property by virtue and in exercise of a power duly created for that purpose. Where real estate was given to trustees in fee upon trust for the separate use of a married woman in fee (the terms of the trust being such that the separate use attaches upon the *corpus*, *Troutbeck* v. *Boughey*, L. R. 2 Eq. 534; 35 L. J. Ch. 840), she had the same power of disposition by deed or will over the equitable fee as if she were a *feme sole*, *Taylor* v. *Meads*, 4 D. J. & S. 597; 34 L. J. Ch. 208. And if the legal fee was in the married woman herself, she could devise the equitable fee, and the heir-at-law was a trustee of the legal estate for her devisee, *Hall* v. *Waterhouse*, 5 Giff. 64.

Power to devise fee settled to her separate use.

As to the testamentary power of a woman judicially separated from her husband, see 20 & 21 Vict. c. 85, s. 25. And as to the will of a married woman who, deserted by her husband, had obtained a protection order under 20 & 21 Vict. c. 85, s. 21, see *In b. Faraday*, 2 Sw. & Tr. 369; 31 L. J. P. 7; *In b. Elliott*, L. R. 2 P. & D. 274; 40 L. J. P. 76. In *In b. How*, 1 Sw. & Tr. 53; 27 L. J. P. 37, where the husband of the testatrix had not been heard of for seven years, probate was granted as if the testatrix had died a widow.

Separated from her husband.

Protection order.

A woman married before 1883, and the title to whose property was acquired before that date, can make a valid will of personalty which is not settled to her separate use, but she requires the consent of her husband, *Elliot* v. *North*, [1901] 1 Ch. 424, 430; 70 L. J. Ch. 217. In such case the death of the husband in his wife's lifetime revokes his consent to the will, *Willock* v. *Noble*, L. R. 7 H. L. 580; 44 L. J. Ch. 345, and the husband can revoke his consent at any time during his wife's life. When the husband has once assented after his wife's death, he cannot revoke his assent, though probate has not been granted, *Maas* v. *Sheffield*, 1 Rob. 364. See Deane, Wills, 65; see also *In b. Reay*, 4 Sw. & Tr. 215; 31 L. J. P. 154; *In b. Cooper*, 6 P. D. 34; 50 L. J. P. 41. In *Badeley* v. *Lyte*, a wife's will submitted (but not consented) to by the husband, who was ignorant of his power of giving or withholding consent, was pronounced against (Prob. Ct. December 16, 1859). The husband must have full knowledge of his rights to render his consent binding.

Will of personalty with consent of husband.

Husband's power of revocation of consent.

(*b*) The word "will" only is now sufficient and is used throughout these forms. See p. 77, note (*e*).

(*c*) The 18th section of the Married Women's Property Act, 1882, empowers a married woman to act as executrix without her husband, and the Married Women's Property Act, 1907, extended her power to real as well as personal property held by her as trustee or personal representative (sect. 1). The powers of a married woman in this connection are now declared by sect. 170 of the Law of Property Act, 1925.

45 & 46 Vict. c. 75.

7 Edw. 7, c. 18.

If the sole object is to give an absolute interest for the separate use of a married woman, or place her in the position of a *feme sole* as regards the property, there is no longer any reason why the will should differ in form from a testamentary disposition in favour of any other beneficiary taking absolutely; but see note (*f*), Prec. 9. But if it is desired to impose a restraint on anticipation, the next following Precedent should be adopted, which will probably be better suited to the majority of cases in which provision is made for a married woman.

(*d*) Express revocation is desirable. The statement "This is the *only* will of me" is not a sufficient revocation, see *Simpson* v. *Foxon*, [1907] P. 54; 76 L. J. P. 7. The clause of revocation given in this Precedent is

NOTES TO PREC. 1.

employed throughout these forms, and is comprehensive, and the useless variations of the clause in the forms in former editions of this work have been abandoned. See the notes to sect. 20 of the Wills Act, *ante*. The clause may be, and often is, inserted at the end of the will, as in this form, instead of at the beginning.

Attestation clause.

(*e*) It is suggested that the attestation clause should be complete in itself without requiring any reference to the body of the will. The form given in the text complies with all the requirements of sect. 9 of the Wills Act and the decisions thereon. No unnecessary words are inserted in it, unless it be such as it would, in the absence of further decision, be unsafe to omit. Though not essential, it is highly desirable that the witnesses should know that the writing they attest is a will. Witnesses of intelligence and respectability should be selected, and preference is to be given to professional men, whose subscription of the memorandum of attestation raises a presumption that the formalities of execution have been strictly attended to. Moreover, there is greater facility in finding such witnesses, if living, and in proving their handwriting, if dead. The witnesses should not be persons who, or whose wives or husbands, take any benefit under the will.

Selection of witnesses.

Formal execution of instructions for will.

The Wills Act, by subjecting wills of every kind to the requisitions of signature and attestation, has of course deprived mere unattested instructions, in the handwriting of a third person or even of the testator himself, of all operation. It seems advisable, therefore, where a testator is *in extremis*, that the instructions should, if adequately expressed to convey his intention, be duly signed and attested according to the statute, in order to guard against sudden death or incapacity occurring before the preparation and execution of the more formal instrument. Moreover, practitioners would be well advised to make it their practice to preserve all written instructions which they may receive from the testator, inasmuch as if any question should arise as to the competency of the testator, or as to his knowledge or approval of the contents of his will, such instructions may prove of the utmost importance. A convenient practice is to keep such instructions with the draft will.

For forms of testimonium and attestation clauses, see Miscellaneous Forms, *post*, pp. 401 *et seq.*, and see the Wills Act, s. 9, *ante*, and notes.

PREC. 2.

No. II.

WILL *disposing of Real and Personal Estate in favour of Testator's Daughter, a married Woman, for her separate Use, restrained from Anticipation.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Devise of messuages for separate use of married daughter.

2. I DEVISE all my messuages and hereditaments situate at —— in the county of York (*a*) and all other the real estate to which I may be entitled at my death for such estates and generally in such manner as my daughter [*name*] the wife of —— shall whilst covert by will or when discovert by deed or

will appoint And in default of such appointment to my said daughter during her life without power of anticipation and from and after her death to my trustees hereinafter named upon trust that my trustees shall sell the same and hold the net proceeds of such sale in trust for the person or persons who at the death of my said daughter would be her heirs or co-heirs according to the law in force before the year 1926 and if more than one in equal shares.

Bequest of personal estate upon trust to convert and invest;

3. I BEQUEATH all the personal estate of which I shall die possessed Unto the said —— and —— [*trustees' names*] Upon trust to call in or sell and convert into money (*b*) such parts thereof as shall not consist of money and out of the moneys produced by such calling in sale and conversion and all other moneys arising from or forming part of my residuary estate to pay my debts and my funeral and testamentary expenses and a legacy of £—— to my said daughter (which legacy I direct shall be paid as soon as possible after my decease) and subject thereto (*c*) upon trust to invest the residue (*d*). And to pay the income and annual proceeds of the said investments to my said daughter [*name*] during her life for her separate use without power of anticipation And from and after the death of my said daughter as to as well the capital as the income of the said investments UPON TRUST for such person or persons and if more than one in such shares and generally in such manner as my said daughter shall whilst covert by will or when discovert by deed or will appoint AND in default of any such appointment or so far as any partial appointment shall not extend Upon trust for such person or persons as would by law have become entitled to the said trust premises at the death of my said daughter had she been absolutely entitled thereto and died intestate a widow and domiciled in England such persons if more than one to take the shares which they would have taken under the Administration of Estates Act 1925 AND I DECLARE that no apportionment of the rents of my said real estate shall take place in respect of the period current at my death.

—pay income to daughter for her separate use.

Appointment of executors and trustees.

4. I APPOINT the said —— and —— to be executors and trustees of this my will and trustees thereof for the purposes of the Settled Land Act 1925 (*e*) AND I declare that the expression my trustees shall in this my will and in any and every codicil hereto save where such interpretation is precluded by the context include the trustees or trustee for the time being of this my will.

IN WITNESS whereof I have hereunto set my hand this —— day of —— 19

NOTES TO PREC. 2.

NOTES to Precedent 2.

Registration of wills in Yorks and Middlesex.

(*a*) Probates of wills devising lands in Yorkshire or Middlesex should be registered in the Registry Offices of those counties. The Registry for the West Riding of Yorkshire is at Wakefield, for the East Riding is at Beverley, for the North Riding is at Northallerton. The Middlesex Registry is at the Land Registry, Lincoln's Inn Fields, and at 18, Portugal Street, W.C.2. See sect. 11 of the Law of Property Act, 1925.

The Registry Act for Yorkshire is the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), amended by 48 & 49 Vict. c. 4, and 48 & 49 Vict. c. 26.

The Registry Act for Middlesex is the Middlesex Registry Act, 1708 (7 Anne, c. 20), amended by 54 & 55 Vict. c. 64.

By sect. 127 of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87) (subject to the exception contained in the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I.), land registered under that Act was exempt from the jurisdiction of the Yorkshire and Middlesex Registries, and registration under the Land Registration Act, 1925, gives, under sect. 135 of that Act, the same exemption.

The Land Transfer Act, 1897, s. 20, enabled His Majesty, By Order in Council, to render registration compulsory on sale in any one county to be selected by the Order. And now such an Order can be made under sect. 121 of the Land Registration Act, 1925.

For the procedure under the Acts, and for the effect of registration in giving priority to registered over unregistered instruments, the reader is referred to the Acts themselves and the rules made thereunder.

Trustee clauses.

(*b*) Unless it should be considered desirable in any particular case to amplify or abridge the powers and indemnities conferred upon executors and trustees by the Trustee Act, 1925 (15 Geo. 5, c. 19), it is unnecessary now to insert in wills any clauses of the character formerly considered necessary. The Trustee Act, 1893 (56 & 57 Vict. c. 53) provided for many of these clauses, and the Trustee Act, 1925, now renders many of the clauses inserted in old days unnecessary.

The sections of the Trustee Act, 1925, which are referred to are as follows:—

Power of trustee for sale to sell by auction, &c.

Sect. 12.—"(1.) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.

"(2.) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical, or made in any other way.

"(3) This section does not enable an express power to sell settled land to be exercised where the power is not vested in the tenant for life or statutory owner."

Power to sell subject to depreciatory conditions.

Sect. 13.—"(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

"(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

"(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon any of the grounds aforesaid.

"(4.) This section applies to sales made before or after the commencement of this Act."

Power of trustee to give receipts.

Sect. 14.—"(1.) The receipt in writing of a trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same, and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.

"(2.) This section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for—

"(a) the proceeds of sale or other capital money arising under a disposition on trust for sale of land;

"(b) capital money arising under the Settled Land Act, 1925.

"(3.) This section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust."

Power for executors and trustees to compound, &c.

Sect. 15. "A personal representative, or two or more trustees acting together, or subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he or they think fit—

"(a) accept any property, real or personal, before the time at which it is made transferable or payable; or

"(b) sever and apportion any blended trust funds or property; or

"(c) pay or allow any debt or claim on any evidence that he or they think sufficient; or

"(d) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or

"(e) allow any time of payment of any debt; or

"(f) Compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing whatever relating to the testator's or intestate's estate or to the trust;

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition, or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith."

Power to raise money by sale, mortgage, &c.

Sect. 16.—"(1.) Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession.

"(2.) This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not

NOTES TO PREC. 2.

apply to trustees of property held for charitable purposes, or to trustees of a settlement for the purposes of the Settled Land Act, 1925, not being also the statutory owners."

Protection to purchasers and mortgagees dealing with trustees.

Sect. 17. "No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof."

Devolution of powers or trusts.

Sect. 18.—"(1) Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

"(2.) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust.

"(3.) This section takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation.

"(4.) In this section "personal representative" does not include an executor who has renounced or has not proved."

Power to insure.

Sect. 19.—"(1.) A trustee may insure against loss or damage by fire any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding three fourth parts of the full value of the building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to such income.

"(2.) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so."

Power to employ agents.

Sect. 23.—"(1.) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

"(2.) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting insurances (*sic*) of, or managing or cultivating, or otherwise administering any property, real or personal, moveable or immoveable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside the United Kingdom or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

"(3.) Without prejudice to such general power of appointing agents as aforesaid—

NOTES TO PREC. 2.

"(a) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration;

"(b) A trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the production of any such deed by the solicitor shall have the same statutory validity and effect as if the person appointing the solicitor had not been a trustee;

"(c) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the banker or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment:

"Provided that nothing in this subsection shall exempt a trustee from any liability which he would have incurred if this Act and any enactment replaced by this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee.

"This subsection applies whether the money or valuable consideration or property was or is received before or after the commencement of this Act."

Exoneration of trustees in respect of certain powers of attorney.

Sect. 29. "A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying:

"Provided that—

"(a) nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made;

"(b) the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee."

Implied indemnity of trustees.

Sect. 30.—"(1.) A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

NOTES TO PREC. 2.

"(2.) A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers."

Power for trustees and executors, engaged on war service, to delegate the execution of trusts was conferred by the Execution of Trusts (War Facilities) Act, 1914, and the Execution of Trusts (War Facilities) Amendment Act, 1915, and now provision is made for the delegation of trusts during trustees' absence abroad by sect. 25 of the Trustee Act, 1925. It may here be mentioned that a purported delegation of the power to make a will is void. *Hartilow* v. *Stobie*, L. R. 1 P. & D. 64, 68; *Re Hughes*, [1921] 2 Ch. 208, 212; *Attorney-General* v. *National Provincial and Union Bank of England*, [1924] A. C. 262; 93 L. J. Ch. 231.

(*c*) The object of leaving a legacy to the daughter is to provide her with ready money for mourning or other necessaries before she comes into receipt of income. If not considered desirable in any particular case, this legacy may be omitted.

(*d*) See note (*b*), Prec. 4.

(*e*) See note (*a*), Prec. 5.

PREC. 3.

No. III.

WILL *disposing of Real and Personal Estate in favour of the Testator's Widow and two Adult Sons, the Widow taking a Legacy, and subject thereto a Life Estate in the Entirety.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Devise of real estate to widow for life;

—remainder for sons equally.

2. I DEVISE all the real estate to which I shall be entitled at the time of my death to my wife [*name*] (*a*) during her life without impeachment of waste AND after her decease to my trustees hereinafter named upon trust that my trustees shall sell the same and hold the net proceeds of such sale in trust for my two sons [*name*] and [*name*] as tenants in common in equal moieties.

Bequest of personal estate.

Upon trust to convert and invest;

—income to widow for life;

3. I BEQUEATH all the chattels real and personal estate to which I shall be entitled at the time of my death unto my trustees Upon trust to sell and convert into money such parts thereof as shall not consist of money and out of the moneys to arise therefrom and all other moneys arising from or forming part of my residuary estate to pay my debts and funeral and testamentary expenses and a legacy of £—— to my said wife (which legacy I direct shall be paid as soon as possible after my decease) (*b*) and to invest the clear residue thereof (*c*) And upon trust to permit my said wife to receive the income of the said

investments during her life and after her death to divide the capital thereof equally between my said two sons their respective executors administrators or assigns. PREC. 3. —after her death, capital to sons, equally.

4. I DECLARE that no apportionment of the rents of my said real estate shall take place in respect of the period current at my death but such rents when received shall be paid to my said wife as income.

5. I APPOINT my said wife and said sons executrix and executors and trustees of this my will and trustees for the purposes of the Settled Land Act 1925.

6. I DECLARE that the expression my Trustees shall in this my will and in any and every codicil hereto save where such interpretation is precluded by the context include the trustees or trustee for the time being of this my will. Interpretation clause.

IN WITNESS &c.

NOTES to Precedent 3.

(*a*) This applies only to the person who at testator's death is in the status and position of his wife. Therefore, if the testator in his lifetime obtains a divorce from his wife, the divorced woman will not take anything under this devise, *Re Morrieson*, 40 Ch. D. 30; 58 L. J. Ch. 80; in which case Kay, J., commented adversely on *Bullmore* v. *Wynter*, 22 Ch. D. 619; 52 L. J. Ch. 456. Also if in a will there is a gift to the wife of another person, and there is at the date of the will and of the death of the testator a woman living known to the testator as the wife of that person, the gift *prima facie* refers to that existing wife, and not to any subsequent wife that the other person may have, *Re Coley*, [1903] 2 Ch. 102. Compare this last case with *Re Drew*, [1899] 1 Ch. 336; and see *Re Hardyman*, [1925] 1 Ch. 287. As to a reputed wife, see Jarm. Wills, ch. 43, and *Re Pearce* [1914] 1 Ch. 254.

(*b*) The object of leaving a legacy to the wife is to provide her with ready money until she comes into the receipt of income. If not considered desirable in any particular case, this legacy may be omitted.

(*c*) See note (*b*), Prec. 4.

No. IV.

PREC. 4.

WILL *of a* WIDOWER *devising his Real Estate to an only Son; bequeathing his Personal Estate to his adult unmarried Daughters, and on the Death or Marriage of all, the Capital to be equally divided amongst all his Daughters and the Children or remoter Issue of deceased Daughters.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

PREC. 4.

2. I APPOINT my son —— and —— of &c. to be the executors and trustees of this my will.

Devise of real estate to son.

3. I DEVISE all my freehold estates to my said son.

Bequest of personal estate, —for spinster daughters.

4. I BEQUEATH to my said trustees all my personal estate upon the trusts following that is to say As to my household furniture and effects UPON TRUST that my trustees shall permit such of my daughters as shall not be or have been married to have the use and enjoyment thereof so long as they or any of them shall live and remain spinsters or a spinster And subject thereto to hold the same upon the trusts hereinafter declared concerning my residuary personal estate AND AS to my chattels real and all the residue of my personal estate UPON TRUST that my trustees shall call in or sell and convert into money such parts thereof as shall not consist of money and out of the moneys to arise therefrom and all other moneys arising from or forming part of my residuary estate pay my debts and my funeral and testamentary expenses and a legacy of £—— to each of my said unmarried daughters (such legacies to be paid as soon as possible after my decease) (*a*) And invest the net surplus AND upon further trust that my trustees shall pay the annual income of the said investments to such of my daughters as for the time being shall not be or have been married so long as they or any of them shall live and remain spinsters or a spinster AND when and so soon as each and every one of my daughters shall have either died or married then and thenceforth shall hold both the capital and the income of the said trust funds UPON TRUST for all my daughters living at the aforesaid period of distribution and the children then living of any daughters of mine then dead as tenants in common in course of distribution according to the stocks the children of a deceased daughter taking by substitution as tenants in common the share only which their mother if living at the period of distribution would have taken Provided that if any daughter of mine shall die having had any child or children who shall not be living at the period of distribution but who shall have left issue who shall be living at such period then such issue shall take and if more than one equally between them the share or shares which his her or their parent or parents would have taken had such parent or parents been alive at such period.

On death or marriage of all, to be divided amongst all the daughters and the children of deceased daughters.

5. [*Investment clause if desired*] (*b*).

6. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c. (*c*).

NOTES to Precedent 4.

(*a*) The object of leaving legacies to the daughters is to provide them with ready money until they come into the receipt of income. If not considered desirable in any particular case, these legacies may be omitted.

(*b*) Having regard to the wide range of trust investments which were authorised by the Trustee Act, 1893 (56 & 57 Vict. c. 53), and are now authorised by the Trustee Act, 1925, investment clauses are not so requisite as formerly. In practice, however, an investment clause is often asked for, and where it is desired to extend the trustees' powers of investment the following clause or so much of it as may be desired, may be inserted in the will:—

NOTES TO PREC. 4.

Investment clause (full form).

Moneys liable to be invested under this my will may be invested by my trustees in their names or under their legal control in manner following that is to say

(A) In or upon any investment or security for the time being authorised by law for the investment of trust moneys.

(B) In the purchase of any hereditaments or heritable properties in England Scotland or Wales but not in Ireland and whether freehold or leasehold for years held for a term whereof sixty years at the least shall be unexpired at the time of such purchase whether such freehold or leasehold premises shall be already subject to covenants conditions or stipulations of a restrictive nature or otherwise or not or shall be sold subject to the purchaser entering into such covenants conditions or stipulations or not or shall or shall not be subject to leases either reserving ground rents or improved rents or rack rents or otherwise or to tenancies or other rights or any easements.

(C) In any freehold leasehold or chattel real securities in England Scotland or Wales but not in Ireland including securities upon rentcharges or first charges registered under the Land Registration Act 1925 on freehold or leasehold hereditaments in England or Wales but so that any leaseholds shall have at least sixty years unexpired at the date of making such investment And any such investment on mortgage security or registered charge may be made whether the hereditaments constituting the security shall be subject to any covenants conditions or stipulations of a restrictive nature or otherwise or not or shall or shall not be subject to leases either reserving ground rents or improved rents or rack rents or otherwise or to tenancies or other rights or any easements.

(D) In the purchase of any perpetual rentcharges or fee farm rents secured upon or issuing or arising out of freehold hereditaments in England or Wales but not in Ireland or in the purchase of any feu duties in Scotland.

(E) In stocks funds or securities of any British Colony Dominion Commonwealth or Dependency or any Province or Constituent State thereof.

(F) In loans funds bonds stocks or securities of any Municipal Corporation County Council Board of Works or Local Authority

NOTES TO PREC. 4.

or public body in the United Kingdom or any part of the British Empire.

(G) In Bonds Mortgages Debentures or Debenture Stock or Guaranteed or Preference Shares or Guaranteed or Preference Stock issued or guaranteed by any company incorporated by Royal Charter or by Special Act or under any general Act or Acts of the Imperial Parliament or the legislature of any British Colony Dominion Commonwealth or Dependency or any Province or Constituent State thereof in or carrying on business in the United Kingdom or any part of the British Empire and having paid dividends on its ordinary capital at a rate of not less than [three] per centum per annum for at least five years next preceding the time of making the investment of which fact a letter purporting to be signed by the Secretary of the Company or by an English Banker or Member of a firm of English Bankers or by the Secretary or Manager of a Joint Stock Bank in England or any branch thereof shall be sufficient evidence.

(H) In the purchase or upon the mortgage of a life interest in real or personal property in Great Britain but not in Ireland under any Settlement Deed or Will provided that the capital so invested shall be secured by a policy or policies effected with some respectable Insurance Office on the life of the person on whose death such life interest will determine for an amount exceeding by one-fifth such invested capital and the premiums payable on the policy or policies shall if paid by my trustees be treated as payable out of income and the amount of the policy or policies shall so far as it or they shall belong to the said trust premises be treated as capital.

AND my trustees may transpose any investments into others of any nature hereinbefore authorised.

Or the following brief but comprehensive form may be adopted in lieu of the preceding items:—

Investment clause (a short form).

(a) In the purchase of any securities or investments having an official quotation on the London Stock Exchange other than shares in mining companies.

(b) Upon the security of personal property of any nature.

A trust to invest implies a power to vary investments, *Re Pope's Contract*, [1911] 2 Ch. 442; 80 L. J. Ch. 692.

Having regard to sect. 32 of the Law of Property Act, 1925, it is unnecessary to confer a power of sale upon trustees in the case where the authorised investments comprise hereditaments, and in such a case powers of management are conferred by sects. 28 and 29 of that Act.

If investment in the stock or shares of a particular company is authorised, the event of an alteration in the constitution of the business should be provided for, and the authority should be to invest—

In or upon any Debentures Debenture Stock Preference or

Ordinary or other shares or stock of [*name of Company*] or of any other company which upon a reconstruction or amalgamation or otherwise may be formed to acquire or may in fact acquire the business or any part of the business now carried on by [*name of Company*].

NOTES TO PREC. 4.

The provisions of the Trustee Act, 1925, with reference to investments, are as follows:—

Authorised investments.

Sect. 1—"(1.) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:

"(a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom;

"(b) On real or heritable securities in the United Kingdom, including the security of a charge on freehold land by way of legal mortgage and a charge under section thirty-three of the Finance Act, 1896;

"(c) In the stock of the Bank of England or the Bank of Ireland;

"(d) In India Seven, Five and a half, Four and a half, Three and a half, Three and Two and a half per cent. stock, or in any other capital stock which may at any time be issued by the Secretary of State in Council of India under the authority of any Act of Parliament, and charged on the revenues of India, or any other securities the interest in sterling whereon is payable out of and charged on the revenues of India;

"(e) In any securities the interest of which is for the time being guaranteed by Parliament;

"(f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District, or in metropolitan water stock;

"(g) In the debenture or rentcharge, or guaranteed or preference, stock of any railway company in the United Kingdom incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum on its ordinary stock;

"(h) In the stock of any railway or canal company in the United Kingdom whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in paragraph (g) of this subsection, either alone or jointly with any other railway company;

"(i) In the debenture stock of any company owning or operating a railway in India the interest in sterling on which is paid or guaranteed by the Secretary of State in Council of India;

"(j) In the "B" annuities of the Eastern Bengal, the East Indian, the Scinde Punjaub and Delhi, Great Indian Peninsula and Madras Railways, or in any securities substituted therefor, and any like annuities which may at any time after the commencement of this Act be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in

NOTES TO PREC. 4.

lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D and annuities comprised in the register of annuitants Class C of the East Indian Railway Company;

"(k) In the stock of any company owning or operating a railway in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed;

"(l) In the debenture or guaranteed or preference stock of any company in the United Kingdom established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five per centum on its ordinary stock;

"(m) In nominal or inscribed stock issued, or to be issued, under the authority of any Act of Parliament or Provisional Order, by the corporation of any municipal borough in the United Kingdom having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council in the United Kingdom;

"(n) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners have not exceeded eighty per centum of the amount authorised by law to be levied;

"(o) In any stocks, funds, or securities authorised under the Colonial Stock Act, 1900, or any Act extending the same, but subject to any restrictions thereby imposed;

"(p) In any local bonds issued under the Housing (Additional Powers) Act, 1919, and mortgages of any fund or rate granted after the passing of that Act under the authority of any Act or Provisional Order by a local authority (including a county council) which is authorised to issue local bonds under that Act;

"(q) In any stock or securities issued in respect of any loan raised by the Government of Northern Ireland;

"(r) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the court;

and may also from time to time vary any such investment.

"(2) For the purposes of this section—

"(a) the London and North-Eastern Railway Company, the Southern Railway Company, the London Midland and Scottish Railway Company, and the Great Western Railway Company shall each be treated as if it were a railway company in Great Britain incorporated by a special Act of Parliament which had in each of the ten years immediately before the date of amalgamation paid a dividend at a rate of

not less than three per centum on its ordinary stock, and, for the purposes of this provision the date of amalgamation means—

"(i) As respects the London and North-Eastern Railway Company and the Southern Railway Company the first day of January, nineteen hundred and twenty-three; and

"(ii) as respects the London Midland and Scottish Railway Company and the Great Western Railway Company the first day of July, nineteen hundred and twenty-three;

"(b) a railway or canal company in Northern Ireland whose system is situate partly in Northern Ireland and partly in the Irish Free State shall not be deemed to be a railway or canal company in Northern Ireland."

Purchase at a premium of redeemable stocks; change of character of investment.

Sect. 2.—"(1.) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

"Provided that in the case of any stock mentioned or referred to in paragraphs (g), (i), (k), (l), (m), (o), (p) and (q) of subsection (1) of section one of this Act, which is liable to be redeemed at par or at some other fixed rate, a trustee shall not be entitled to purchase the stock—

"(a) at a price exceeding fifteen per centum above par or such other fixed rate; nor

"(b) if the stock is liable to be so redeemed as aforesaid within fifteen years of the date of purchase, at a price exceeding its redemption value.

"(2.) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act, or any statute replaced by this Act."

Discretion of trustees.

Sect. 3. "Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent or direction required by the instrument, if any, creating the trust or by statute with respect to the investment of the trust funds."

Power to retain investment which has ceased to be authorised.

Sect. 4. "A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by the general law."

Enlargement of powers of investment.

Sect. 5.—"(1) A trustee having power to invest in real securities may invest and shall be deemed always to have had power to invest—

"(a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

"(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

"(2.) A trustee having power to invest in real securities may accept the security in the form of a charge by way of legal mortgage, and may, in exercise of the statutory power, convert an existing mortgage into a charge by way of legal mortgage.

"(3.) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may invest in the debenture stock of a railway company or such other company as aforesaid.

NOTES TO PREC. 4.

"(4.) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

"(5.) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

"(6.) A trustee having a general power to invest trust money in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865."

Power to invest in land subject to drainage charges.

Sect. 6. "A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase or on mortgage of any land notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge."

Investment in bearer securities

Sect. 7.—"(1) A trustee may, unless expressly prohibited by the instrument creating the trust, retain or invest in securities payable to bearer which, if not so payable, would have been authorised investments:

"Provided that securities to bearer retained or taken as an investment by a trustee (not being a trust corporation) shall, until sold, be deposited by him for safe custody and collection of income with a banker or banking company.

"A direction that investments shall be retained or made in the name of a trustee shall not, for the purposes of this subsection, be deemed to be such an express prohibition as aforesaid.

"(2.) A trustee shall not be responsible for any loss incurred by reason of such deposit, and any sum payable in respect of such deposit and collection shall be paid out of the income of the trust property."

Loans and investments by trustees not chargeable as breaches of trust.

Sect. 8.—"(1.) A trustee lending money on the security of any property on which he can properly lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the court—

"(a) that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere; and

"(b) that the amount of the loan does not exceed two third parts of the value of the property as stated in the report; and

"(c) that the loan was made under the advice of the surveyor or valuer expressed in the report.

"(2.) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

NOTES TO PREC. 4.

"(3.) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase, or in lending money upon the security, of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted.

"(4.) This section applies to transfers of existing securities as well as to new securities and to investments made before as well as after the commencement of this Act."

Liability for loss by reason of improper investment.

Sect. 9.—"(1.) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

"(2.) This section applies to investments made before as well as after the commencement of this Act."

Powers supplementary to powers of investment.

Sect. 10.—"(1.) Trustees lending money on the security of any property on which they can lawfully lend may contract that such money shall not be called in during any period not exceeding seven years from the time when the loan was made, provided interest be paid within a specified time not exceeding thirty days after every half-yearly or other day on which it becomes due, and provided there be no breach of any covenant by the mortgagor contained in the instrument of mortgage or charge for the maintenance and protection of the property.

"(2.) On a sale of land for an estate in fee simple or for a term having at least five hundred years to run by trustees or by a tenant for life or statutory owner, the trustees, or the tenant for life or statutory owner on behalf of the trustees of the settlement, may, where the proceeds are liable to be invested, contract that the payment of any part, not exceeding two-thirds, of the purchase money shall be secured by a charge by way of legal mortgage or a mortgage by demise or subdemise for a term of at least five hundred years (less a nominal reversion when by sub-demise), of the land sold, with or without the security of any other property, such charge or mortgage, if any buildings are comprised in the mortgage, to contain a covenant by the mortgagor to keep them insured against loss or damage by fire to the full value thereof.

"The trustees shall not be bound to obtain any report as to the value of the land or other property to be comprised in such charge or mortgage, or any advice as to the making of the loan, and shall not be liable for any loss which may be incurred by reason only of the security being insufficient at the date of the charge or mortgage; and the trustees of the settlement shall be bound to give effect to such contract made by the tenant for life or statutory owner.

"(3.) Where any securities of a company are subject to a trust, the trustees may concur in any scheme or arrangement—

"(a) for the reconstruction of the company;

"(b) for the sale of all or any part of the property and undertaking of the company to another company;

"(c) for the amalgamation of the company with another company;

"(d) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them;

in like manner as if they were entitled to such securities beneficially, with power to accept any securities of any denomination or description

NOTES TO PREC. 4.

of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities; and the trustees shall not be responsible for any loss occasioned by any act or thing so done in good faith, and may retain any securities so accepted as aforesaid for any period for which they could have properly retained the original securities.

"(4.) If any conditional or preferential right to subscribe for any securities in any company is offered to trustees in respect of any holding in such company, they may as to all or any of such securities, either exercise such right and apply capital money subject to the trust in payment of the consideration, or renounce such right, or assign for the best consideration that can be reasonably obtained the benefit of such right or the title thereto to any person, including any beneficiary under the trust, without being responsible for any loss occasioned by any act or thing so done by them in good faith:

"Provided that the consideration for any such assignment shall be held as capital money of the trust.

"(5.) The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by law or by the instrument, if any, creating the trust.

"(6.) Where the loan referred to in subsection (1), or the sale referred to in subsection (2), of this section is made under the order of the court, the powers conferred by those subsections respectively shall apply only if and as far as the court may by order direct."

Power to deposit money at bank and to pay calls.

Sect. 11.—"(1.) Trustees may, pending the negotiation and preparation of any mortgage or charge, or during any other time while an investment is being sought for, pay any trust money into a bank to a deposit or other account, and all interest, if any, payable in respect thereof shall be applied as income.

"(2) Trustees may apply capital money subject to a trust in payment of the calls on any shares subject to the same trust."

A direction to invest in a particular way did not "expressly forbid" an investment authorised by the Trustee Act, 1893, *Re Burke*, [1908] 2 Ch. 248; 77 L. J. Ch. 597. As to investment of capital money under the Settled Land Act, 1925, see sect. 73 of that Act.

(*c*) The above precedent is one which should only be adopted in special circumstances. It is appropriate to a case where the testator's personal estate is not large and is not capable of yielding a larger income than the last daughter remaining unmarried will require for her support. The circumstance that the income left for the daughters or daughter remaining unmarried would be inadequate if the daughters marrying took their shares of the capital is the only justification for such a disposition as is made by this precedent. The inconveniences which may attend the adoption of the precedent are obvious enough:—For example, a testator leaves three daughters, two marry and have children and grandchildren, the third never marries, but outlives her married sisters and, perhaps, some or all of their children also. In such a case, neither of the married daughters nor their deceased children will have derived any benefit from the bequest.

No. V.

PREC. 5.

WILL disposing of Real and Personal Estate in favour of two Sons, of whom one is an Adult and the other a Minor.—Direction to purchase a Life Annuity.

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT my son [*name*] and [*names* &c.] executors and trustees of this my will and trustees thereof for the purposes of the Settled Land Act 1925 (*a*).

Devise of real estate in favour of elder son.

3. I DEVISE the dwelling-house at —— in which I now reside with the garden orchard and appurtenances thereto belonging and the pieces of land called respectively [*names*] now in my occupation situate in the said parish of —— with the easements and appurtenances therewith usually occupied or enjoyed (*b*) unto my said son (*c*).

Devise of other real estate in favour of younger son.

4. I DEVISE my messuage and lands (*d*) situate at —— now in the occupation of [*tenant*] as tenant thereof with the easements and appurtenances therewith usually occupied or enjoyed To my younger son [*name*] But in case my said younger son shall die under the age of twenty-one years then I DEVISE the last-mentioned hereditaments and premises to my said elder son.

5. I DECLARE that any mortgage debts affecting the hereditaments hereinbefore devised to my younger son shall be discharged and satisfied out of my personal estate (*e*) AND that no apportionment of rents current at my death shall take place as between my said sons and my executors.

Direction to executors to purchase life annuity.

6. I DIRECT my trustees to purchase in their names an annuity of £20 (*f*) for the life of my servant [*name*] to begin from my death and to be payable half-yearly or quarterly such purchase to be made in the discretion of my trustees either from Government or any public company or from any private person or persons but so that the annuity if purchased from any private person or persons shall be well secured on real or leasehold property And I direct that until such purchase shall be made a like annuity shall be paid to her out of the income of my residuary estate in equal quarterly portions And I declare that the said [*annuitant*] shall not be allowed to have the value of the said annuity in lieu thereof And I further declare that in case of the happening of any act or event whereby the said annuity or any part thereof if belonging to her absolutely would become vested in or charged in favour of some other person or persons

PREC. 5.

or a corporation the said annuity whether purchased or not shall cease to be payable to her and shall thenceforth form part of the income of my residuary estate.

Bequest to younger son of stock legacy.

7. I BEQUEATH to my younger son if he shall attain the age of twenty-one years the sum of £2,000 in Two and a-half per Cent. Consolidated Stock to be transferred to him within three calendar months after he shall attain that age or if he should attain it in my lifetime within three calendar months after my death.

Direction to pay legacy duty.

8. I DIRECT that the legacy duty and expenses incident to the bequests of the annuity and stock legacy hereinbefore respectively bequeathed shall be paid out of my residuary personal estate.

9. AS TO THE RESIDUE (*g*) of the real and personal property which may belong to me at my death I DEVISE AND BEQUEATH the same to my eldest son.

Appointment of guardians.

10. I APPOINT the said —— and —— guardians of my younger son during his minority (*h*).

11. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 5.

(*a*) Under sect. 42 of the Conveyancing Act, 1881, amended by sect. 14 of the Conveyancing Act, 1911, so as to extend to the case of married female infants, and under sect. 58 (1) (ii) and (2), and sects. 59 and 60 of the Settled Land Act, 1882, trustees appointed for the purposes of the Acts had powers of management and other powers during the minority of the infant devisee, see *Re Helyar*, [1902] 1 Ch. 391; 71 L. J. Ch. 209. Now trustees of the will appointed for the purposes of the Settled Land Act, 1925, will, after 1925, have the requisite powers under sects. 26 and 102 of that Act, and in the absence of such appointment, the personal representatives of the testator would, until such trustees were appointed, be trustees of the settlement for the purposes of that Act (sect. 30 (3)).

Easements usually enjoyed.

(*b*) On the effect of the words "easements and appurtenances therewith usually occupied or enjoyed," see *Pheysey* v. *Vicary*, 16 M. & W. 484; *Wardle* v. *Brocklehurst*, 1 E. & E. 1058; *Ewart* v. *Cochrane*, 4 Macq. 117; *Pearson* v. *Spencer*, 3 B. & S. 761; *Polden* v. *Bastard*, L. R. 1 Q. B. 156; 35 L. J. Q. B. 92; *Smith* v. *Ridgway*, L. R. 1 Ex. 331; 35 L. J. Ex. 11; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; 44 L. J. Q. B. 210; *Barkshire* v. *Grubb*, 18 Ch. D. 616; 50 L. J. Ch. 731. And as to the limits of the doctrine of the "disposition of the owner of two tenements" (Gale, Easements, 111), see *Suffield* v. *Brown*, 4 D. J. & S. 185; 33 L. J. Ch. 249; *Watts* v. *Kelson*, L. R. 6 Ch. 166; 40 L. J. Ch. 126; *Wheeldon* v. *Burrows*, 12 Ch. D. 31; 48 L. J. Ch. 853.

(*c*) By sect. 131 of the Law of Property Act, 1925, the rule in *Shelley's Case* is abolished and if property is expressed to be given to the heirs of a person, the word "heirs" will operate in equity as a word of purchase.

What words embrace

(*d*) Uncertainty as to the scope of expression descriptive of the subject of the gift is a frequent source of difficulty in the construction of wills.

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realty—"estate," "property."

Sometimes the doubt is whether the terms embrace real as well as personal estate. The words "estate" and "property" clearly extend to and comprise realty, and "belongings" has been held to mean "property," *Re Bradfield*, [1914] W. N. 423. "Estate" in a will is *genus generalissimum*, and of its own force, without any proof *aliunde*, carries realty as well as personalty; and is not to be confined to personalty only, unless a clear intention can be gathered from the whole will, or from the way in which the word is used in the particular part in question, *Mayor of Hamilton* v. *Hodsdon*, 6 Moo. P. C. 76. And where a testator devised and bequeathed all his "estate and effects" to A., to be paid, assigned, and transferred to him on his attaining twenty-one, it was held that copyholds of inheritance passed by the devise, notwithstanding the words of payment and transfer, which strictly were applicable only to personalty, *Stokes* v. *Salomons*, 9 Ha. 75; 20 L. J. Ch. 343; *D'Almaine* v. *Moseley*, 1 Drew. 629; 22 L. J. Ch. 971; *Phillips* v. *Beal*, 25 Be. 27; *Lloyd* v. *Lloyd*, L. R. 7 Eq. 458; 38 L. J. Ch. 458; *Kirby-Smith* v. *Parnell*, [1903] 1 Ch. 483; 72 L. J. Ch. 468. But a different decision was given in *Coard* v. *Holderness*, 20 Be. 147; 24 L. J. Ch. 388, grounded on the special circumstances in that case. The words "I constitute A. and B. my residuary legatees," will not give them the testator's real estate, *Windus* v. *Windus*, 6 D. M. & G. 549; 26 L. J. Ch. 185; *Re Methuen and Blore's Contract*, 16 Ch. D. 696; 50 L. J. Ch. 464; but the expression is not of invariable meaning, *Hughes* v. *Pritchard*, 6 Ch. D. 24; 46 L. J. Ch. 840; *Singleton* v. *Tomlinson*, 3 App. Cas. 404; *Re Gibbs*, [1907] 1 Ch. 465; 76 L. J. Ch. 238. That the words "estate" and "property" may be restrained by the context, see *Timewell* v. *Perkins*, 2 Atk. 102; *Doe* v. *Rout*, 7 Tau. 79; *Doe* v. *Hurrell*, 5 B. & Al. 18; *Saunderson* v. *Dobson*, 16 L. J. (N.S.) Ex. 249. What constitutes a restraining context can only be learnt by a minute examination of the cases, which will be found to present some very nice distinctions, particularly respecting the effect of the association, with the words "estate" and "property," of terms descriptive of personalty only, *Roberts* v. *Thorp*, 56 S. J. 13; and of the introduction into the devise of trusts inapplicable to real estate. But the inclination of the present day is to hold lands to pass under words capable *per se* of comprehending them, in spite of their association with words applicable only to personalty, see *Attree* v. *Attree*, L. R. 11 Eq. 280; 40 L. J. Ch. 192; *Smyth* v. *Smyth*, 8 Ch. D. 561; 38 L. T. 633. As the word "estate" or any other term of comprehensive import may be restrained to personalty by its more limited associates, so terms in themselves loose and ambiguous may be extended to real estate by force of the intention collected from the whole will, *i.e.*, there may be an enlarging as well as a restraining context, *Wilce* v. *Wilce*, 7 Bing. 664; 9 L. J. C. P. 197; see the comments on this case in *Cook* v. *Jaggard*, L. R. 1 Ex. 125; 35 L. J. Ex. 76. Even the words "personal estates" have been held sufficient upon the context to pass realty, *Doe* v. *Tofield*, 11 Ea. 246. See also 1 Jarm. Wills, ch. 22, and Hawkins, Constr. Wills, p. 72 *et seq.*

"Estate and effects."

"Residuary legatees."

Restraining context.

Enlarging context.

If, owing to the testator having several properties answering the description in the will, it is impossible to say, either from the will itself or from such extrinsic evidence as is admissible, which of these properties the testator referred to, the gift fails for uncertainty, as the Court cannot, to avoid an intestacy, construe the will as giving the legatee the option of electing which property he will take, *Asten* v. *Asten*, [1894] 3 Ch. 260; 63 L. J. Ch. 834. As to right of selection see also *Re Cheadle*,

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[1900] 2 Ch. 620; 69 L. J. Ch. 753, where *Asten* v. *Asten* was considered.

Word "lands" comprises what.

The word "lands" will carry houses, unless both words occur in the will and stand in opposition. Thus, if a testator having a house and lands devises generally all his lands, the whole will pass; but if he devises his house to one, and his lands to another, the house of course will not pass under the latter devise, *Heydon's Will*, 2 And. 123. A devise of lands does not generally embrace incorporeal hereditaments, as tithes, rents, &c.; but such hereditaments would pass under a devise of lands at a particular place, if the testator had no other property answering to that locality, *Rich* v. *Sanders*, Sty. 261. So a devise of a particular manor has been held to carry a rent issuing out of such manor, the testator having no other interest therein, *Inchley* v. *Robinson*, 2 Leon. 41, pl. 57. A devise of lands in a named county to A. will not pass moneys arising from the sale which are subject to a trust for reinvestment in lands in England, but the moneys will pass under a residuary devise of realty, *Re Duke of Cleveland's Settled Estates*, [1893] 3 Ch. 244; 62 L. J. Ch. 955. See also *Re Gosselin*, [1906] 1 Ch. 120; 75 L. J. Ch. 88; *Re Glassington*, [1906] 2 Ch. 305; 75 L. J. Ch. 670. To avoid such questions, it is advisable to use descriptive terms more comprehensive than the word "lands"—such as "tenements," "hereditaments," or "real estate." As to the meaning of "personal and landed estates," see *Hoare* v. *Byng*, 10 C. & F. 508.

"Messuage" comprises what.

There seems to be no material difference between the technical and popular signification of the word "messuage." Two acres of land situate four miles distant from a messuage have been held not to pass under the devise of a messuage *cum pertinentiis*, *Hearn* v. *Allen*, Cro. Car. 57. In another instance, a much larger quantity was adjudged to be included in a devise of "three messuages with all houses, stables, &c., that stand upon or belong to the said messuages," by reason, it would seem, of the land having been conveyed to the testator by the description of a messuage or tenement, with the appurtenances, *Gulliver* v. *Poyntz*, 2 W. Bl. 726; but the case is not to be relied on, the evidence being clearly inadmissible to affect the construction. In another case, the devise of a house was held to carry land employed by the testator to raise hay and corn for his own consumption, because he had directed that the devisee should be at the charge of housekeeping, servants' wages, and coach horses; these horses were used to plough the land in question, and the Court considered the testator as having directed that they should continue to be so used; but in the will, as stated, there is no such direction, *Blackborn* v. *Edgley*, 1 P. W. 600. In *Heach* v. *Pritchard*, W. N. 1882, p. 140, a devise of "my cottage and garden" included an adjoining orchard.

"Premises," how construed.

The word "premises" signifies what has gone before, and therefore may, with propriety, be used in relation to any preceding subject or subjects. Thus, where a testator devised a certain messuage and the furniture in it to A. for life, and after his decease he gave the said messuage and premises to B., the latter gift was held to carry the furniture as well as the messuage to B., *Sanford* v. *Irby*, 4 L. J. Ch. 23. See also *Doe* v. *Meakin*, 1 Ea. 456; *Fitzgerald* v. *Field*, 1 Rus. 416; 4 L. J. (o.s.) Ch. 171; *Lethbridge* v. *Lethbridge*, 3 D. F. & J. 523; 30 L. J. (N.S.) Ch. 388; *Hibon* v. *Hibon*, 1 N. R. 532; 32 L. J. Ch. 374.

"Share."

Questions often arise whether the word "share," or other such term, applies to one, or more than one, of several preceding subjects of gift: as

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to which, see *Doe* v. *Stopford*, 5 Ea. 501; *Hardman* v. *Johnson*, 3 Mer. 347; *Doe* v. *Gell*, 2 B. & C. 680; *Doe* v. *Bowling*, 5 B. & Al. 722; *Adshead* v. *Willetts*, 29 Be. 358.

"In or near a place."

Local indefiniteness is always to be avoided, such as devising lands in or near a place. A devise of "all my estates in or near Latchington, near Maldon," was held not to include a close which was from four to six miles from L., and was in the town of Maldon, *Doe* v. *Pigott*, 7 Tau. 553. In applying this and every other term of description, local or otherwise, property to which the words might have been stretched for want of a more appropriate subject will be excluded by the existence of one more nearly answering to the term in question, *Doe* v. *Bower*, 3 B. & Ad. 453; 1 L. J. (N.S.) K. B. 156; *Webber* v. *Stanley*, 16 C. B. (N.S.) 698; 33 L. J. C. P. 217; *Smith* v. *Ridgway*, L. R. 1 Ex. 331; 35 L. J. Ex. 11; *Pedley* v. *Dodds*, L. R. 2 Eq. 819. A devise of "my freehold property at Masbrough" (in the parish of Rotherham) did not pass property at Rotherham, though the testator never had any at Masbrough, *Barber* v. *Wood*, 4 Ch. D. 885; 46 L. J. Ch. 728.

Peculiar construction of words of local description rejected.

Though a testator may show by the context of his will that he uses a local appellation in a peculiar and extraordinary sense, yet this conclusion will not be adopted upon slight or equivocal grounds, *Doe* v. *Johnson*, 5 Nev. & M. 281; 4 L. J. (N.S.) K. B. 242.

As to reference to occupancy.

In devising a property by name, uncertainty is sometimes produced by describing it to be in the occupation of a person whose occupancy embraces less than the whole. In such a case, the reference to occupancy is not generally restrictive, *Goodtitle* v. *Southern*, 1 M. & S. 299; *Down* v. *Down*, 7 Tau. 343; *Doe* v. *Carpenter*, 16 Q. B. 181; 20 L. J. Q. B. 70.

Words of suggestion and affirmation not restrictive.

Words of suggestion or affirmation, added to a definite description, are as a general rule not restrictive As where a testatrix having devised all that her Briton Ferry estate, with all the manors, &c., thereunto belonging, afterwards, when describing another estate, added, "which, as well as my Briton Ferry estate, is situate in the county of Glamorgan"; part of the Briton Ferry estate was in Breconshire; but it was held that the words did not exclude the Breconshire portion of the estate, *Doe* v. *Earl of Jersey*, 1 B. & Al. 550. So, where a testator devised all his lands at S., given him by his brother's will, it was held that the devise was not confined to what he took by his brother's will, *Welby* v. *Welby*, 2 V. & B. 187. And see *Norman* v. *Norman*, [1919] 1 Ch. 297. In *Travers* v. *Blundell*, 6 Ch. D. 436, an appointment was not limited by an incomplete enumeration of closes of land. And where a testatrix devised all her interest in the lands known by the name of D., situate in the parish of K., and in the occupation of E., it was held that the devise included closes in the parish of L., and a close situate in the parish of K., but occupied by M., *Hardwick* v. *Hardwick*, L. R. 16 Eq. 168; 42 L. J. Ch. 636. In this case Lord Selborne stated these two rules:—1. If all the terms of description fit some particular property, they cannot be enlarged by extrinsic evidence, so as to include anything which any part of those terms does not accurately fit. 2. If the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, and what is subordinate matter, and for this purpose evidence of extrinsic facts may be regarded. In *Re Bright-Smith*, 31 Ch. D. 314; 55 L. J. Ch. 365, where a testator devised his "freehold" farm and land situate at E.,

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and now in the occupation of J. B., and the farm comprised about 76 acres, of which 26 were copyhold, the word "freehold" was held to be only the subordinate description, and the whole farm passed under the devise. In this case there was no residuary devise, so that, if the copyhold portion had been held to be excluded, there would have been an intestacy, which the Court always leans against. Although the absence of a residuary devise sufficed to distinguish this case from *Hall* v. *Fisher*, 1 Coll. 47; and *Stone* v. *Greening*, 13 Sim. 390, Chitty, J., questioned these decisions. See also *Whitfield* v. *Langdale*, 1 Ch. D. 61; 45 L. J. Ch. 177; *Re Brocket*, [1908] 1 Ch. 185; 77 L. J. Ch. 245. A gift of "all my Bank stock and foreign securities," was held not to be narrowed by the addition of the words "as invested by L., broker," *Drake* v. *Martin*, 23 Bea. 89; 26 L. J. Ch. 786, and the words "my property not in England, in the hands of my attorney W., consisting of, &c.," passed all the property abroad (*ib.*).

As to reference to locality only.

It would seem that where the property is described by a reference to its locality only, and not by name, as where a testator devises all his messuages, lands, &c., at A. in his own occupation, the devise will not extend to a messuage and piece of land at A. not in his own occupation, there being a house and land at A. exactly answering to the description, *Doe* v. *Parkin*, 5 Tau. 321; see also *Doe* v. *Ashley*, 10 Q. B. 663; 16 L. J. Q. B. 356; *Doe* v. *Hubbard*, 15 Q. B. 227; 20 L. J. (N.S.) Q. B. 61; *Homer* v. *Homer*, 8 Ch. D. 758; 47 L. J. Ch. 635. Sometimes

Reference to occupancy.

the occupancy, being more comprehensive than any other particular in the description, has the effect of enlarging instead of restricting the extent of a devise, *Press* v. *Parker*, 2 Bing. 456; 3 L. J. C. P. 96. Where a testator devised an estate called D. "as now enjoyed by me," the devise was held to include closes belonging to an adjoining estate, which the testator had added to D. by removing the fences, and which were then in his occupation, *Bodenham* v. *Pritchard*, 1 B. & C. 350; 1 L. J. K. B. 131. See notes to sect. 24 of the Wills Act, *ante*. So, under a devise of "the house I live in and garden," stables and a yard in a ring-fence, and a coal-pen on the opposite side of the road, which were used by the testator partly for domestic purposes and partly in trade, were held to pass, *Doe* v. *Collins*, 2 T. R. 498. See also *Hibon* v. *Hibon*, 1 N. R. 532. In *Re Seal*, [1894] 1 Ch. 316; 63 L. J. Ch. 275, the devise was of "my residence called S. House, and premises thereto, as the same are now occupied by me." Some years before making this devise, testator had let to two of his sons, for the purposes of their business, an office standing in the yard of S. House, and the stable and coach-house belonging to the house, except a room on the first floor of the coach-house to which the only access was through the house, and the sons were in occupation till testator's death. *Held* (C. A.), that the devise included the room over the coach-house, but did not include the rest of the coach-house and stable nor the office, for that the property which was in the testator's own occupation answered the whole of the description, and that being so the Court could not enter into the question of inconvenience, and reject the reference to occupation as *falsa demonstratio*. But a devise of "my capital messuage or mansion-house wherein I now live, and the buildings, gardens, grounds, and appurtenances to the same belonging, or therewith used," has been decided not to comprise cottages on the opposite side of a road, and in the occupation of tenants, though the testatrix was in the habit of using the space betwen two of the cottages for turning her carriage,

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Hougham v. *Sandys*, 2 Sim. at p. 151; 6 L. J. (o.s.) Ch. 67. See also *Josh* v. *Josh*, 5 Jur. (N.S.) 225; 28 L. J. (N.S.) C. P. 100. A devise of a manor with the lands "thereunto belonging" was partly, by the aid of the context, extended to lands not properly parcel of the manor, though in a popular sense situate within the manor, *Doe* v. *Langton*, 2 B. & Ad. 680. But under a devise of lands "in the parish of C., with their appurtenances," outlying pieces in other parishes, though held with the C. lands, did not pass, *Evans* v. *Angell*, 26 Be. 202. A mansion with 166 acres of land was held to pass by a devise of "all my estate in Shropshire called Ashford Hall," *Ricketts* v. *Turquand*, 1 H. L. C. 472, where parol evidence was admitted to show what the testator had been accustomed to consider the Ashford Hall estate. See Jarm. Wills, ch. 35, sect. iii; and *Re Mayell*, [1913] 2 Ch. 488; 83 L. J. Ch. 40.

"Goods," &c., in or about a house.

Personal chattels are sometimes described by a reference to locality, as where a testator bequeaths the "household goods," "things," "property," or "effects," which are in and about his place of residence. See note (*a*) to Prec. 8, and see Jarm. Wills, ch. 30, iii. (6). A gift of "goods," "chattels," or "effects" in or about a house will in general pass cash (including notes payable on demand, which are considered as cash), but not securities for money, these being only the evidence of title to property situated elsewhere, *Green* v. *Symonds*, 1 Bro. C. C. 129, n.; *Moore* v. *Moore*, *ib.* 127; *Fleming* v. *Brook*, 1 Sch. & Lef. 318 (discussed in *Arnold* v. *Arnold*, 2 M. & K. 365; 4 L. J. (N.S.) Ch. 123); *Brooke* v. *Turner*, 7 Sim. 671; 5 L. J. (N.S.) Ch. 176; *Jones* v. *Lord Sefton*, 4 Ves. 166; *Stuart* v. *Marquis of Bute*, 11 Ves. 657, 662; *Hertford* v. *Lowther*, 7 Be. 1; 13 L. J. Ch. 41; *Collier* v. *Squire*, 3 Rus. 467; 5 L. J. (o.s.) Ch. 186; *Swinfen* v. *Swinfen*, 29 Be. 207; 4 L. J. (N.S.) Ch. 194 (discussed in *Campbell* v. *McGrain*, Ir. R. 9 Eq. 397, and *Northey* v. *Paxton*, 60 L. T. 30); 2 Wms. Exors. 1040. But see *Gibbs* v. *Lawrence*, 9 W. R. 93; 30 L. J. (N.S.) Ch. 170; *Roberts* v. *Kuffin*, 2 Atk. 112. In *Hall* v. *Hall*, [1892] 1 Ch. 361; 61 L. J. Ch. 289, the context showed that "effects" included real estate. Under a gift of "furniture, goods and chattels," in testator's house, only chattels *ejusdem generis* as furniture passed, such in fact as would, if the house had been let as a furnished house, have passed to a tenant taking the house, and not such articles as jewellery, gems, or scientific instruments, *Manton* v. *Tabois*, 30 Ch. D. 92; 54 L. J. Ch. 1008. See also *Re Seton-Smith*, [1902] 1 Ch. 717; 71 L. J. Ch. 386. Where a testator gave "half my property at Rothschild's Bank," *choses in action* were held to pass to the legatee, *Re Prater*, 37 Ch. D. 481; 57 L. J. Ch. 342; and where the gift was of a desk, "with the contents thereof," *choses in action* found therein, such as a cheque to the order of the testator, but unindorsed, promissory notes payable to the testator or order, and also unindorsed, and a promissory note payable on demand, passed to the legatee. The desk also contained the key of a security box, and it was held that the key gave no title to the contents of the box, this box not being itself in the desk, *Re Robson*, [1891] 2 Ch. 559; 60 L. J. Ch. 851. In this case Chitty, J., remarked on the risk run in making bequests of this nature. Under a bequest of "property," or "all my estate and effects," described as being in a certain locality, debts due from persons in that locality to the testator will be included, *Nisbett* v. *Murray*, 5 Ves. 149; *Arnold* v. *Arnold*, 2 M. & K. 365; 4 L. J. (N.S.) Ch. 123; *Earl of Tyrone* v. *Marquis of Waterford*, 1 D. F. & J. 613; 29 L. J. Ch. 486; *Guthrie* v. *Walrond*, 22 Ch. D. 573; 52

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L. J. Ch. 165; *Re Clark*, [1904] 1 Ch. 294; 73 L. J. Ch. 188. A gift of a "house and its contents" does not, as a general rule, pass things which are evidence of property outside the house, *e.g.*, title deeds to land or stock and share certificates, *Re Craven*, 99 L. T. 390; 100 L. T. 284.

Exception from bequest.

But if a testator expressly excepts any particulars to which the bequest would not otherwise have extended, such exception will have the effect of enlarging the construction, see *Hotham* v. *Sutton*, 15 Ves. 319. And if in a general devise or bequest the testator introduces an exception of uncertain extent, the effect of such uncertainty is merely to neutralise the exception, and not to invalidate the disposition containing it, *Blundell* v. *Gladstone*, 14 Sim. 83, reversed on evidence 3 Mac. & G. 692.

"Chattels and effects."

A bequest of "chattels and effects" standing alone and unrestricted is clearly adequate to pass the whole personal estate, *Kendall* v. *Kendall*, 4 Russ. 370; 6 L. J. (o.s.) Ch. 111; yet, where these words are collocated with household goods, they may be, and frequently are, restrained to articles *ejusdem generis*, *Woolcombe* v. *Woolcombe*, 3 P. W. 112; *Timewell* v. *Perkins*, 2 Atk. 102; *Porter* v. *Tournay*, 3 Ves. 311; *Rawlings* v. *Jennings*, 13 Ves. 39; *Sutton* v. *Sharp*, 1 Russ. 146. And where a testator gave his household furniture, books, pictures, engravings, plate, linen, china, and other effects to two persons in equal shares, it was held that the word "effects" ought to be limited to things of the same kind as those previously enumerated, and that articles of jewellery could not fall under that description, *Re Hammersley*, 81 L. T. 150. See also *In b. O'Loughlin*, L. R. 2 P. & D. 102; 39 L. J. P. 53. But in *Gover* v. *Davis*, 29 Be. 222; 30 L. J. Ch. 505; *Nugee* v. *Chapman*, 29 Be. 291; and *Hodgson* v. *Jex*, 2 Ch. D. 122; 45 L. J. Ch. 388, property not *ejusdem generis* was held to be included. Again, the word "effects," though *prima facie* comprising only personalty (Hawkins, Constr. Wills, 70), has been held on the context to pass real estate, *Milsome* v. *Long*, 3 Jur. (N.S.) 1073; see also *Stelfox* v. *Stelfox* (1874), W. N. 161; *Smyth* v. *Smyth*, 8 Ch. D. 561; *Doe* v. *Tofield*, 11 Ea. 246. See further as to the force and extent of particular words of description, Jarm. Wills, ch. 27 and ch. 28.

(*e*) See note (*a*), Prec. 16.

As to the modes of providing for the payment of annuities.

(*f*) There are two ordinary modes of providing for the payment of annuities not charged on any specific property. One is, by directing the executors to invest an adequate sum in the purchase of stock or some other security yielding income, until the decease of the annuitant, when the fund falls into the residue; and the other by directing an annuity to be purchased, as in the text. The former is the more usual, and is, in general, the more eligible mode. It has the effect, however, of absorbing presently a larger portion of the capital to provide for the annuity, and is attended with this (sometimes inconvenient) consequence, that it protracts the final distribution of the residuary personal estate until the expiration of the annuity; so that, where the testator is desirous that as large a portion of income as possible shall be immediately available for the general trusts, or where (as in the present instance) the residue is disposed of in such a manner as, independently of the annuity, to admit of a speedy distribution, it seems advisable to direct the executors to purchase the annuity. This is, in fact, equivalent to leaving the annuitant a legacy equal in amount to the estimated value of his annuity; for the annuitant (or, if the purchase be not made in his lifetime, his personal representative) can elect to receive the value, *Dawson* v. *Hearn*, 1 R. &

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M. 606; 8 L. J. Ch. 153; *Woodmeston* v. *Walker*, 2 R. & M. 197; 9 L. J. Ch. 257; *Barnes* v. *Rowley*, 3 Ves. 305; *Re Browne's Will*, 27 Be. 324. If the testator directs a sum of money to be laid out at a future time in the purchase of an annuity, and the annuitant dies before that time, his representatives will be entitled to the money, *Bayley* v. *Bishop*, 9 Ves. 6; *Day* v. *Day*, 1 Drew. 569; 22 L. J. Ch. 878; *Palmer* v. *Craufurd*, 3 Swanst. 482. If an annuity is directed to be purchased for a person on the happening of a contingent event, and he dies before that event, his representatives have no claim; but if he dies after the event and before purchase of the annuity, his representatives will be entitled to the money, *Re Mabbett*, [1891] 1 Ch. 707; 60 L. J. Ch. 279; *Re Brunning*, [1909] 1 Ch. 276; 78 L. J. Ch. 75. See also *Power* v. *Hayne*, L. R. 8 Eq. 262; *Re Draper's Trust*, 57 L. J. Ch. 942; *Re Strange*, [1916] W. N. 251; in which cases *Day* v. *Day*, 1 Drew. 569; 22 L. J. Ch. 878, was not followed; *Re Robbins*, [1907] 2 Ch. 8; 76 L. J. Ch. 531. An express declaration in the will that the annuitant shall not be allowed to have the value in lieu of the annuity, if standing alone, is inoperative, *Stokes* v. *Cheek*, 28 Be. 620; 29 L. J. Ch. 922; for such a prohibition would not prevent the annuitant from selling or incumbering the annuity as soon as it was purchased, and it would be idle to make a purchase of that which the annuitant could immediately afterwards resell; the subsequent declaration in the text, as to cesser, is therefore necessary, *Hatton* v. *May*, 3 Ch. D. 148. But where a testator has covenanted to pay a life annuity, it does not follow, if after the death of the testator his estate is sufficient and the payments are made, that the annuitant is entitled to require a portion of the estate to be sold for the purpose of having the value of the annuity paid, *Yates* v. *Yates*, 28 Be. 637; 29 L. J. Ch. 872. As to the power of the Court, in the absence of special direction in the will, to set apart out of residue a sufficient sum to answer the annuity, see *Harbin* v. *Masterman*, [1896] 1 Ch. 351; 65 L. J. Ch. 195; *Re Evans and Bettell's Contract*, [1910] 2 Ch. 438; 79 L. J. Ch. 609. And see sect. 41 of the Administration of Estates Act, 1925.

Residue to elder son.

(*g*) As to the words "residue," "surplus," "rest and residue," "remaining property," "what is left," see *Bebb* v. *Penoyre*, 11 Ea. 160; *Mayor of South Molton* v. *Att.-Gen.*, 5 H. L. C. 1; 23 L. J. Ch. 567; *Presant* v. *Goodwin*, 1 Sw. & Tr. 544; 29 L. J. P. 115; *Attree* v. *Attree*, L. R. 11 Eq. 280; 40 L. J. Ch. 192; *Smyth* v. *Smyth*, 8 Ch. D. 561; *Re Willatts*, [1905] 2 Ch. 135; 74 L. J. Ch. 564; Wms. Exors. 1196; and *Re Dixon*, 56 S. J. 445, where a gift of all "absolutely," followed by a gift over of "residue," was held to confer a life interest; and as to a bequest of "money which may remain after payment of my debts," see *Stocks* v. *Barré*, Joh. 54 (compare *Re Campbell*, [1918] 1 I. R. 429, cited, *post*, p. 198). For an instance of a constructive gift of residue, see *Hodgkinson* v. *Barrow*, 2 Ph. 578; 17 L. J. Ch. 131; *Re Johnson*, 92 L. T. 357; and for a case where the words "residue of my things" were held, in the circumstances, not to comprise the whole of the testator's property, *In b. Ludlow*, 1 Sw. & Tr. 29; 27 L. J. P. 7. As to the effect of exceptions in a residuary bequest, see *West* v. *Laking*, 12 Jur. 129; *Blight* v. *Hartnoll*, 23 Ch. D. 218; 52 L. J. Ch. 672; *Re Fraser*, [1904] 1 Ch. 726; 73 L. J. Ch. 481. As to whether a bequest is residuary or specific, see *Sargent* v. *Roberts*, 12 Jur. 429; 17 L. J. Ch. 117; *Clarke* v. *Butler*, 1 Mer. 304; *Re Kendall's Trusts*, 14 Be. 608; 21 L. J. Ch. 278; *Fitzwilliams* v. *Kelly*, 10 Ha. 266; 22 L. J. Ch. 1016; *Fielding* v.

Residue.

Residuary or specific.

NOTES TO PREC. 5.

Preston, 1 De G. & J. 438; *Robertson* v. *Broadbent*, 8 App. Cas. 812; 53 L. J. Ch. 266; *Re Green*, 40 Ch. D. 610; 58 L. J. Ch. 157. As to the effect of the Wills Act upon a general devise, see *ante*, pp. 56 *et seq.*

Intermediate income.

A general residuary bequest, though contingent, carries with it the intermediate income, which is not undisposed of, but accumulates until the determination of the contingency, *Green* v. *Ekins*, 2 Atk. 473; *Trevanion* v. *Vivian*, 2 Ves. S. 430. See *Re Taylor*, [1901] 2 Ch. 134; 70 L. J. Ch. 535. And a gift of real and personal estate, blended, though contingent in terms, carries the intermediate rents of the realty as well as the income of the personalty, and consequently the *interim* rents of the real estate, as well as the *interim* income of the personalty, must be accumulated until the happening of the contingency, and will follow the destination of the *corpus*. To constitute a blending of the real and personal estate, it is not necessary that both should be given together on one page of the will. If the will show an intention on the testator's part to effect a blending, this is enough, *Genery* v. *Fitzgerald*, Jac. 468; *Re Dumble*, 23 Ch. D. 360; 52 L. J. Ch. 631; *Re Burton's Will*, [1892] 2 Ch. 38; 61 L. J. Ch. 702. But the intermediate income arising from a specific bequest did not pass to the legatee until the period of vesting, and, pending the vesting, fell into the residuary personalty, *Wyndham* v. *Wyndham*, 3 Br. C. 58; *Hodgson* v. *Earl of Bective*, 1 H. & M. 376; 32 L. J. Ch. 489; *Holmes* v. *Prescott*, 3 N. R. 559; 33 L. J. Ch. 264; *Guthrie* v. *Walrond*, 22 Ch. D. 573; 52 L. J. Ch. 165; *Re Eyre*, [1917] 1 Ch. 351; 86 L. J. Ch. 257; and was regarded as undisposed-of income merely, as between the parties entitled to the residue, *Fullerton* v. *Martin*, 1 Dr. & S. 31; 29 L. J. Ch. 469; *Edmunds* v. *Waugh*, 2 N. R. 408; unless the specific bequest were segregated and vested in trustees for the benefit of the object of the gift when the contingency happened, within the principle of *Re Medlock*, 55 L. J. Ch. 738; *Re Clements*, [1894] 1 Ch. 665; 63 L. J. Ch. 326; *Re Woodin*, [1895] 2 Ch. 309; 64 L. J. Ch. 501. And a power to the trustees to apply the whole, or such part as they may think fit, of the income, before vesting, for the maintenance of those in whom, if they live long enough, the legacy will vest, will not operate to vest the legacy, *Re Wintle*, [1896] 2 Ch. 711; 65 L. J. Ch. 863. See also *Re Turney*, [1899] 2 Ch. 739; 69 L. J. Ch. 1. But see *Long* v. *Ovenden*, 16 Ch. D. 691; 50 L. J. Ch. 314, as to the intermediate income of a fund vested in interest, but the enjoyment of which is postponed. And see *Re Williams*, [1907] 1 Ch. 180; 76 L. J. Ch. 41; *Re Hume*, [1912] 1 Ch. 693; 81 L. J. Ch. 382; Jarm. Wills, pp. 1410 *et seq.*; *Re Woolf*, [1920] 1 Ch. 184; 89 L. J. Ch. 11; *Re Ussher*, [1922] 2 Ch. 321; 91 L. J. Ch. 521. An executory devise of real estate alone, which did not take effect until the happening of some contingency, did not before 1926 carry with it the intermediate rents, but the same, being undisposed of, belonged to the heir-at-law, *Hopkins* v. *Hopkins*, Ca. t. Talb. 44; Hawkins, Constr. Wills, 61; *Hodgson* v. *Earl of Bective*, 1 H. & M. 376; 32 L. J. Ch. 489; *Countess of Bective* v. *Hodgson*, 10 H. L. C. 656; 33 L. J. Ch. 601; and see *Re Eddel's Trusts*, L. R. 11 Eq. 559; 40 L. J. Ch. 316; *Wade-Gery* v. *Handley*, 3 Ch. D. 374; 45 L. J. Ch. 712; *Astley* v. *Micklethwaite*, 15 Ch. D. 59, 66; 49 L. J. Ch. 672. In the case, however, of wills coming into operation after the year 1925, the law as to intermediate income of contingent and future testamentary gifts has been altered by sect. 175 of the Law of Property Act, 1925, which provides—

Personalty and realty blended.

Specific bequest.

Realty only.

Sect. 175.—"(1) A contingent or future specific devise or bequest of

property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations [see sects. 164—166], carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of. NOTES TO PREC. 5.

"(2) This section applies only to wills coming into operation after the commencement of this Act."

(*h*) See note (*f*), Prec. 12.

No. VI.

PREC. 6.

WILL *of a* MARRIED MAN, *giving the Income of his Property to his Wife during Widowhood; subject thereto, the Capital equally among his Children, the Children of a deceased Child taking their Parent's Share.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT —— and —— executors and trustees of this my will.

3. I BEQUEATH to my wife [*name*] a legacy of £ to be paid to her within one calendar month [*or* immediately] after my death free of duty and in priority to all other bequests hereby made (*a*). Immediate legacy.

4. I BEQUEATH to my said wife all articles of personal or domestic or household use or ornament (*b*) [free of duty]. Household effects to wife.

5. As to all the rest of my estate and effects both real and personal I DEVISE AND BEQUEATH the same unto my trustees hereinbefore named Upon trust that my trustees shall sell call in and convert into money such parts thereof as shall not consist of money And invest the moneys arising from such sale calling in and conversion and all other moneys arising from or forming part of my residuary estate And pay the annual income of such investment to my wife during her life if she shall so long continue my widow And from and after her death or marriage again as to the capital and income of the same investments hold the same in trust for my children in equal shares the respective shares of such children to be absolutely vested on my death (*c*) Provided that if any child of mine shall die in my lifetime leaving issue who shall survive me and who being male shall attain the age of twenty-one years or being female shall attain that age or marry under that age such issue shall take and if more than one equally between them the share which

Real and residue of personal estate to trustees.

Upon trust to sell;

—and invest the proceeds;

—to pay income to wife during widowhood;

—on her death or marriage capital equally among children;

—issue of deceased child taking

PREC. 6.

parent's share.

their his or her parent would have taken of and in my residuary estate if such parent had lived to attain a vested interest (*d*).

Power to postpone conversion.

6. I DECLARE that my trustees shall have a discretionary power to postpone for such period as to them shall seem expedient the sale calling in or conversion of any parts of my real or personal estate but the unsold real estate and the outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the investments aforesaid and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trusts and the unsold real estate shall be deemed to be converted as from the time of my death and be transmissible as personal estate accordingly.

Widow's income to be made up to a certain sum.

7. I DECLARE that if at any time or times during the widowhood of my wife the annual income of my estate shall be less than £—— it shall be lawful for my trustees to raise out of the capital thereof and pay to my widow such a sum as will make her income up to £—— a year (*e*).

8. *Investment clause.* See note (*b*) to Prec. 4.

9. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

New trustees.

10. I DECLARE that so long as my wife lives and continues unmarried the power of appointing new trustees conferred by statute shall be exercisable by her (*f*).

IN WITNESS &c.

NOTES to Precedent 6.

(*a*) Immediate legacies are liable to abatement unless priority is expressly given, *Re Schweder*, [1891] 3 Ch. 44; 60 L. J. Ch. 656. The words "after making provision" for certain legacies will give them priority over a subsequent bequest, *Re Olivieri*, 56 S. J. 613.

(*b*) This is a short comprehensive form. For a fuller form, see Prec. 8, clause 3 and note thereto.

(*c*) This form of gift to children is only appropriate to cases where all the testator's children have attained twenty-one years of age at the date when the will is made.

If the children have not all attained that age, the following form should be adopted:—

"Upon trust for such of my children as shall survive me and being sons or a son shall have attained or shall attain the age of twenty-one years and being daughters or a daughter shall have attained or shall attain that age or shall have married or shall marry under that age and if there shall be more than one such child then as tenants in common in equal shares."

(*d*) If the gift is to such children only as being sons or a son attain twenty-one, or being daughters or a daughter attain that age or marry, according to the form given in note (*c*), the substitutional gift will be in the following terms:—

"Provided that if any son or daughter of mine shall die in my lifetime or if any son of mine shall survive me but die before attaining the age of twenty-one years and in either of such cases any such son or

daughter so dying shall leave issue born in my lifetime who shall survive me and if male attain the age of twenty-one years or if female attain that age or marry under that age, or a child or children born after my death who shall if male attain the age of twenty-one years, or if female attain that age or marry under that age, such issue or such child or children as the case may be shall take and if more than one equally between them the share which their his or her parent would have taken in my residuary estate if such parent had survived me and attained a vested interest therein."

NOTES TO PREC. 6.

This form meets the case of a son who survives the testator and marries but dies under twenty-one years of age leaving issue.

(*e*) Great care should be taken in adopting this clause, which is only suitable to special cases. If the testator's circumstances were to change for the worse between the date of the will and his death, the insertion of such a clause might operate to exhaust the whole estate during the lifetime of the widow.

(*f*) The statutory power of appointing new trustees referred to in the above precedent is that conferred by the Trustee Act, 1925 (15 Geo. 5, c. 19), which contains provisions (sects. 34 to 40) superseding and replacing the corresponding provisions of the Trustee Act, 1893. The sections of the Trustee Act, 1925, here referred to are as follows:—

Limitation of the number of trustees.

Sect. 34.—"(1) Where, at the commencement of this Act, there are more than four trustees of a settlement of land, or more than four trustees holding land on trust for sale, no new trustees shall (except where as a result of the appointment the number is reduced to four or less) be capable of being appointed until the number is reduced to less than four, and thereafter the number shall not be increased beyond four.

"(2) In the case of settlements and dispositions on trust for sale of land made or coming into operation after the commencement of this Act—

"(a) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;

"(b) the number of the trustees shall not be increased beyond four.

"(3) This section only applies to settlements and dispositions of land, and the restrictions imposed on the number of trustees do not apply—

"(a) in the case of land vested in trustees for charitable, ecclesiastical, or public purposes; or

"(b) where the net proceeds of the sale of the land are held for like purposes; or

"(c) to the trustees of a term of years absolute limited by a settlement on trusts for raising money, or of a like term created under the statutory remedies relating to annual sums charged on land."

Appointments of trustees of settlements and dispositions on trust for sale of land.

Sect. 35.—"(1) Appointments of new trustees of conveyances on trust for sale on the one hand and of the settlement of the proceeds of sale on the other hand, shall, subject to any order of the court, be effected by separate instruments, but in such manner as to secure that the same persons shall become the trustees of the conveyance on trust for sale as become the trustees of the settlement of the proceeds of sale.

"(2) Where new trustees of a settlement are appointed, a memo-

NOTES TO PREC. 6.

randum of the names and addresses of the persons who are for the time being the trustees thereof for the purposes of the Settled Land Act, 1925, shall be endorsed on or annexed to the last or only principal vesting instrument by or on behalf of the trustees of the settlement, and such vesting instrument shall, for that purpose, be produced by the person having the possession thereof to the trustees of the settlement when so required.

"(3) Where new trustees of a conveyance on trust for sale relating to a legal estate are appointed, a memorandum of the persons who are for the time being the trustees for sale shall be endorsed on or annexed thereto by or on behalf of the trustees of the settlement of the proceeds of sale, and the conveyance shall, for that purpose, be produced by the person having the possession thereof to the last-mentioned trustees when so required.

"(4) This section applies only to settlements and dispositions of land."

Power of appointing new or additional trustees.

Sect. 36.—"(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees,—

"(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

"(b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid.

"(2) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust, and the provisions of this section shall apply accordingly, but subject to the restrictions imposed by this Act on the number of trustees.

"(3) Where a corporation being a trustee is or has been dissolved, either before or after the commencement of this Act, then, for the purposes of this section and of any enactment replaced thereby, the corporation shall be deemed to be and to have been from the date of the dissolution incapable of acting in the trusts or powers reposed in or conferred on the corporation.

"(4) The power of appointment given by subsection (1) of this section or any similar previous enactment to the personal representatives of a last surviving or continuing trustee shall be and shall be deemed always to have been exercisable by the executors for the time being (whether original or by representation) of such surviving or continuing trustee who have proved the will of their testator or by the administrators

for the time being of such trustee without the concurrence of any executor who has renounced or has not proved.

"(5) But a sole or last surviving executor intending to renounce, or all the executors where they all intend to renounce, shall have and shall be deemed always to have had power, at any time before renouncing probate, to exercise the power of appointment given by this section, or by any similar previous enactment, if willing to act for that purpose and without thereby accepting the office of executor.

"(6) Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or substituted and whether appointed by the court or otherwise, then and in any such case—

"(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

"(b) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being;

may, by writing, appoint another person or other persons to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee, unless the instrument, if any, creating the trust, or any statutory enactment provides to the contrary, nor shall the number of trustees be increased beyond four by virtue of any such appointment.

"(7) Every new trustee appointed under this section as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any creating the trust.

"(8) The provisions of this section relating to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

"(9) Where a lunatic or defective, being a trustee, is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee in his place shall be made by the continuing trustees or trustee, under this section, unless leave has been given by the Judge or Master in Lunacy to make the appointment."

Supplemental provisions as to appointment of trustees.

Sect. 37.—"(1) On the appointment of a trustee for the whole or any part of trust property—

"(a) the number of trustees may, subject to the restrictions imposed by this Act on the number of trustees, be increased; and

"(b) a separate set of trustees, not exceeding four, may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees, or, if only one trustee was originally appointed, then, save as hereinafter provided, one separate trustee may be so appointed; and

"(c) it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of

NOTES TO PREC. 6.

trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least two individuals to act as trustees to perform the trust; and

"(d) any assurance or thing requisite for vesting the trust property, or any part thereof, in a sole trustee, or jointly in the persons who are the trustees, shall be executed or done.

"(2) Nothing in this Act shall authorise the appointment of a sole trustee, not being a trust corporation, where the trustee, when appointed, would not be able to give valid receipts for all capital money arising under the trust."

Evidence as to a vacancy in a trust.

Sect. 38.—"(1) A statement, contained in any instrument coming into operation after the commencement of this Act by which a new trustee is appointed for any purpose connected with land, to the effect that a trustee has remained out of the United Kingdom for more than twelve months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, shall, in favour of a purchaser of a legal estate, be conclusive evidence of the matter stated.

"(2) In favour of such purchaser any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, consequent on the appointment, shall be valid."

Retirement of trustee without a new appointment.

Sect. 39.—"(1) Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

"(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done."

Vesting of trust property in new or continuing trustees.

Sect. 40.—"(1) Where by a deed a new trustee is appointed to perform any trust, then—

"(a) if the deed contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust, the deed shall operate, without any conveyance or assignment, to vest in those persons as joint tenants and for the purposes of the trust the estate interest or right to which the declaration relates; and

"(b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the

appointor extending to all the estates interests and rights with respect to which a declaration could have been made.

"(2) Where by a deed a retiring trustee is discharged under the statutory power without a new trustee being appointed, then—

"(a) if the deed contains such a declaration as aforesaid by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, the deed shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates; and

"(b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by such persons as aforesaid extending to all the estates, interests and rights with respect to which a declaration could have been made.

"(3) An express vesting declaration, whether made before or after the commencement of this Act, shall, notwithstanding that the estate, interest or right to be vested is not expressly referred to, and provided that the other statutory requirements were or are complied with, operate and be deemed always to have operated (but without prejudice to any express provision to the contrary contained in the deed of appointment or discharge) to vest in the persons respectively referred to in subsections (1) and (2) of this section, as the case may require, such estates, interests and rights as are capable of being and ought to be vested in those persons.

"(4) This section does not extend—

"(a) to land conveyed by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock;

"(b) to land held under a lease which contains any covenant, condition or agreement against assignment or disposing of the land without licence or consent, unless, prior to the execution of the deed containing expressly or impliedly the vesting declaration, the requisite licence or consent has been obtained, or unless, by virtue of any statute or rule of law, the vesting declaration, express or implied, would not operate as a breach of covenant or give rise to a forfeiture;

"(c) to any share, stock, annuity or property which is only transferable in books kept by a company or other body, or in manner directed by or under an Act of Parliament.

"In this subsection "lease" includes an underlease and an agreement for a lease or underlease.

"(5) For purposes of registration of the deed in any registry, the person or persons making the declaration expressly or impliedly, shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

"(6) This section applies to deeds of appointment or discharge executed on or after the first day of January, eighteen hundred and eighty-two."

NOTES TO PREC. 6.

Public Trustee.

Under the Public Trustee Act, 1906 (6 Edw. 7, c. 55), the Public Trustee, who is a corporation sole with perpetual succession (sect. 1 (2)), may be appointed a trustee or (sect. 4) a custodian trustee. (Miscellaneous Forms, *post*, p. 349.) See *Re Cherry's Trusts*, [1914] 1 Ch. 83; 83 L. J. Ch. 142. The fees of the Public Trustee are regulated by the Public Trustee (Fees) Order, 1912. The Order is set out in 1912 W. N. pt. 2, p. 187; Current Index, 1912, p. clxix. And see *Re Bentley*, [1914] 2 Ch. 456; 84 L. J. Ch. 54. The Order of 1912 has been amended by the Public Trustee (Fees) Order, 1917, which will be found in 1917 W. N. pt. 2, p. 113, and the Public Trustee (Fees) Order, 1920; and the Public Trustee (Fees) Order, 1922, 1922 W. N. pt. 2, p. 67.

Infant Trustee.

By sect. 20 of the Law of Property Act, 1925 (15 Geo. 5, c. 20) it is provided:—

Sect. 20.—"The appointment of an infant to be a trustee in relation to any settlement or trust shall be void, but without prejudice to the power to appoint a new trustee to fill the vacancy."

PREC. 7.

No. VII (*a*).

WILL *of a* MARRIED MAN *leaving all his property to Trustees for Sale and Conversion, to pay Debts and Legacies and to invest the Surplus; Income to Wife during Widowhood, charged with Maintenance of Children; Capital among Children equally at twenty-one or Marriage.—Settlement of Shares of Daughters.—Provision for Advancement of Children.—Substitution of Grandchildren for Children dying before Testator.—On Failure of previous Trusts, as Wife shall appoint; in Default for Persons entitled on Intestacy.—Appointment of Guardians.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Appointment of executors.

2. I APPOINT —— and —— executors and trustees of this my will.

Legacies.

3. I BEQUEATH the following legacies that is to say To A. of &c. the sum of £—— To B. of &c. the sum of £——.

Real and personal estate to trustees;

4. I DEVISE unto my said trustees [*names*] all the real estate and I bequeath to them all the personal estate of or to which I shall be seised (*b*) possessed or entitled at my decease upon the trusts and subject to the declarations following that is to say

—sale and conversion;

UPON TRUST that my trustees shall sell and convert into money my said estates or such parts thereof as shall be of a saleable or convertible nature and get in the other parts thereof AND I empower my trustees to suspend for such period as they shall

PREC. 7.

judge expedient the sale conversion or getting in of my said estates or any part or parts thereof respectively and during the suspense of the sale conversion or getting in to manage and order all the affairs thereof as regards letting occupation cultivation repairs insurance against fire receipt of rents indulgences and allowances to tenants and all other matters but so that no lease shall be granted otherwise than from year to year or for a term not exceeding twenty-one years in possession at the most improved rent without fine or premium (*c*) AND I DECLARE that for the purposes of enjoyment and transmission under the trusts hereinafter contained my said estates shall be considered as money from the time of my death and the rents dividends interest and other yearly produce thereof respectively to accrue due after my death and until the actual sale conversion and getting in thereof shall be deemed the annual income thereof applicable as such for the purposes of the said trusts without regard to the amount of such income or to the nature of the property or investments yielding the same AND as to the moneys to arise from the sale conversion and getting in of my said estates and any moneys of which I may be possessed I direct my trustees thereout in the first place to pay or retain all the expenses incident to the execution of the preceding trusts and powers and my debts and funeral and testamentary expenses and in the next place to pay the pecuniary legacies hereinbefore bequeathed AND to invest the ultimate surplus of the said trust moneys (*d*) with power from time to time with the consent in writing of my wife until she shall die or marry and afterwards in the discretion of my said trustees to vary such investment or investments AND I FURTHER direct my trustees to stand possessed of my said trust moneys or the stocks funds and securities whereon the same shall be invested as aforesaid (which moneys stocks funds and securities are hereinafter referred to under the denomination of "the said trust fund") UPON TRUST to pay the annual income thereof to my wife during her life if she shall so long continue my widow she thereout maintaining educating and bringing up in a manner suitable to their station in life such of my sons as shall for the time being be under the age of twenty-one years and such of my daughters as shall for the time being be under that age not having been married AND immediately after the death or future marriage of my wife as to as well the capital as the income of the said trust fund IN TRUST for my child if only one or all my children if more than one who either before or after the death or future marriage of my wife shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be

—discretionary power to postpone conversion;

—interim management;

—constructive conversion from testator's death; rents, &c., to be deemed income.

Trusts of proceeds;

—expenses debts, and legacies;

—investment of ultimate surplus;

—income to wife during her widowhood;

—charged with maintenance, &c., of children;

—capital to children equally.

PREC. 7.

Settlement of the shares of daughters;

married and if more than one in equal shares BUT I declare that if such child or children or any of them shall be a daughter or daughters then the said trust fund or the share thereof to which such daughter or each of such daughters shall become entitled shall be held by my trustees upon the trusts following namely

—investment;

UPON TRUST with the consent in writing of my daughter entitled thereto and after her death in the discretion of my trustees to convert the same into money and invest the moneys to arise therefrom with power from time to time with the like consent or in the like discretion to vary such investment or investments

—inalienable life interest;

AND upon further trust to pay the annual income of the same moneys or the securities whereon the same shall be invested as last aforesaid (which moneys and securities are hereinafter referred to under the denomination of "the said settled fund") as and when the same shall from time to time become actually receivable and not by way of anticipation into the hands of my same daughter during her life for her separate use AND immediately after the death of my same daughter as to as well the capital of the said settled fund as the income thenceforth to accrue due for the same

—children and other issue of daughter as she shall appoint;

IN TRUST for all or any of the children and remoter issue of my same daughter (such remoter issue being born in her lifetime) in such proportions for such interests and generally in such manner as she whether covert or sole shall from time to time by deed with or without power of revocation and new appointment or by her will or any codicil thereto appoint

—hotchpot;

BUT no child in whose favour or in favour of any of whose issue an appointment shall be made shall participate under the trust next hereinafter contained in the unappointed portion of the said settled fund without bringing the benefit of such appointment into hotchpot

—in default for children equally at twenty-one or marriage;

AND in default of appointment and subject to any partial appointment IN TRUST for the child if only one or all the children if more than one of my same daughter who either before or after her death shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married such children if more than one to take in equal shares (*e*)

—if no child attain twenty-one or marry,

AND if there shall not be any child of my same daughter who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then

—as daughter shall by will appoint;

IN TRUST for such person or persons for such interests and generally in such manner in all respects as my same daughter shall by will or codicil appoint

—in default for daughter's next-of-kin;

AND in default of and subject to any such appointment IN TRUST for such person or persons as would under the Administration of Estates Act 1925 have become entitled to the said trust premises at the death of my same daughter had she been

absolutely entitled thereto and died intestate a spinster and domiciled in England such persons if more than one to take the shares which they would have taken under that Act.

—advancement irrespective of minority.

5. I EMPOWER my trustees in their discretion but during any prior interest only with the consent of the person or persons having such interest to raise any part or parts not exceeding in the whole two-thirds (*f*) of the then expectant presumptive or vested share of any child or other issue of mine in the said trust fund and to pay or apply the same for the advancement or benefit of such child or other issue whether under the age of twenty-one years or not.

Substitution of grandchildren for children of testator predeceasing him.

6. I DECLARE that if any son or daughter of mine shall die in my lifetime and any child or children of such son or daughter shall be living at my death then the said trust fund or the share thereof whereto the son or each son so dying would if living at my death and if then of the age of twenty-one years or whereto the daughter or each daughter so dying would if living at my death have been entitled under the trusts aforesaid shall be held by my trustees upon such trusts and subject to such provisions in favour of the child or children of such son or daughter respectively as the same would have been held upon if as regards a son so dying such son were a daughter and had died immediately after my death or as regards a daughter so dying such daughter had died immediately after my death AND subject to the trusts and powers hereinbefore declared and to every exercise of such powers I direct my trustees to hold the same fund IN TRUST for such persons for such interests and generally in such manner as my wife she continuing my widow at her death shall by her will or a codicil thereto appoint AND in default of such appointment or subject to any partial appointment IN TRUST for the person or persons other than my widow who at the death or future marriage of my wife would under the Administration of Estates Act 1925 be entitled to my estate if I were to die intestate immediately after the death or marriage of my widow such persons if more than one to take in the proportions and in manner prescribed by that Act.

On failure of previous trusts;

—as testator's wife shall by will appoint;

—for testator's next-of-kin.

Appointment of guardians.

7. I APPOINT after the death or future marriage of my wife the said —— and —— or the survivor of them to be the guardians or guardian of my children during their respective minorities (*g*).

8. *Investment clause.* See note (*b*) to Prec. 4.

9. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES TO PREC. 7.

NOTES to Precedent 7.

(*a*) See note (*k*) to Prec. 8.

(*b*) "Seised" is a technical word, signifying "possession of such an estate in land as was anciently thought worthy to be held by a free man" (Williams on Seisin), and in the absence of a qualifying context the word is construed according to its technical meaning. Thus, a testator devised all real estate of which he might die seised; lands to which he was lawfully entitled, but which were in the wrongful possession of strangers, the testator having no "seisin" either at law or in fact, did not pass by the devise, *Leach* v. *Jay*, 9 Ch. D. 42; 47 L. J. Ch. 876.

(*c*) In the case of every trust for sale of land, a power to postpone sale is, after 1925, implied under sect. 25 of the Law of Property Act, 1925, unless a contrary intention appears, and under sect. 28 of that Act trustees have powers of management.

(*d*) See note (*b*), Prec. 4.

Maintenance of infants.

(*e*) By the 26th section of Lord Cranworth's Act (23 & 24 Vict. c. 145), a maintenance clause was imported into all wills executed after August 28, 1860. As to that clause, see *Re Breed's Will*, 1 Ch. D. 226; 45 L. J. Ch. 191; *Re Cotton*, 1 Ch. D. 232; 45 L. J. Ch. 201; *Re George*, 5 Ch. D. 837; 47 L. J. Ch. 118.

44 & 45 Vict. c. 41, s. 43.

That section was repealed by the Conveyancing Act, 1881, and was amended and superseded by sect. 43 of the latter Act, which, if a contrary intention was not expressed, applied to all wills, whenever executed; and authorised the application for maintenance of the income of a trust fund to which an infant was entitled only in contingency. But this section did not authorise the allowance of maintenance where, apart from the Act, the infant, on attaining twenty-one, would only be entitled to the legacy without interest. For instance, a simple legacy to an infant contingent on attaining twenty-one is not "property held in trust for an infant contingently on his attaining twenty-one:" such a legacy does not carry interest, the residuary legatee took the whole residue and the whole income thereof unless and until the infant attained twenty-one, *Re Inman*, [1893] 3 Ch. 518; 62 L. J. Ch. 940, and there was nothing to which the section could apply. But it was held that the section did apply to the case of a legacy in trust for an infant for life contingently on attaining twenty-one, *Re Boulter*, [1918] 2 Ch. 40; 87 L. J. Ch. 385. If the legacy, notwithstanding the contingency, were given with interest in the meantime, the section would have applied, and it would have been necessary for the executors to set apart the legacy and invest it; any income not applied for maintenance would have been accumulated, and the accumulations to the time of the legatee's death would, if the legatee died in infancy, have belonged to the infant, *Re Buckley's Trusts*, 22 Ch. D. 583; 52 L. J. Ch. 439; *Re Judkin's Trusts*, 25 Ch. D. 743; 53 L. J. Ch. 496; *Re Dickson*, 29 Ch. D. 331; 54 L. J. Ch. 510; *Re Wells*, 43 Ch. D. 281; 59 L. J. Ch. 113; *Re Bowlby*, [1904] 2 Ch. 685; 73 L. J. Ch. 810. See *Re Holford*, [1894] 3 Ch. 30; 63 L. J. Ch. 637; *Russell* v. *Russell*, [1903] 1 Ir. R. 168; *Re Mellor*, [1922] 1 Ch. 312; 91 L. J. Ch. 393. And see *post*, p. 218.

In the case of wills coming into operation after the year 1925 the powers of trustees in regard to maintenance will be governed by sect. 31 of the Trustee Act, 1925, which replaces sect. 43 of the Conveyancing Act, 1881, and amends the law by providing—

NOTES TO PREC. 7.

Power to apply income for maintenance and to accumulate surplus income during a minority.

Sect. 31.—"(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—

"(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—

"(a) any other fund applicable to the same purpose; or

"(b) any person bound by law to provide for his maintenance or education; and

"(ii) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:

"Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

"(2) During the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments, and shall hold those accumulations as follows:—

"(i) If any such person—

"(a) attains the age of twenty-one years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

"(b) on attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and

"(ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled

NOTES TO PREC. 7.

land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom;

but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

"(3.) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five pounds per centum per annum.

"(4.) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

"(5) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act."

A married infant can under sect. 21 of the Law of Property Act, 1925, give a receipt for statutory accumulations.

Where there is a gift by will of a share of residue, to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for his maintenance, the share is vested and not contingent, *Re Gossling*, [1903] 1 Ch. 448; 72 L. J. Ch. 433. And compare *Re Kirkley*, [1918] W. N. 36; 87 L. J. Ch. 247.

As to the accumulations if the infant attains twenty-one, see *Re Humphreys*, [1893] 3 Ch. 1; 62 L. J. Ch. 498.

As to reading this section as incorporated with the will, see *Re Moody*, [1895] 1 Ch. 101; 64 L. J. Ch. 174; *Re Abrahams*, [1911] 1 Ch. 108; 80 L. J. Ch. 83 (decisions on sect. 43 of the Conveyancing Act, 1881).

Where there is a bequest of personalty upon trust to divide it equally between such of the children of A. as shall survive the testator and attain twenty-one, the first child who attains twenty-one is not entitled, in addition to his share of the *corpus* and the income of such share, to the whole of the income of the fund until another child attains twenty-one (as was decided by North, J., in *Re Jeffery*, [1891] 1 Ch. 671; 60 L. J. Ch. 470), but the income will be divisible into as many parts as there are children in existence, and the first of such children who attains twenty-one will be entitled to his share of such income only, the remaining shares of income being applicable to the maintenance of the infant children, *Re Holford*, *ubi sup.*, and this is so whether the class is or is not capable of increase, *Re Jeffery*, [1895] 2 Ch. 577; 64 L. J. Ch. 830. And see *Re Williams' Settlement*, [1911] 1 Ch. 441; 80 L. J. Ch. 249.

Where a testator has by his will made a settlement of his estate, subject to a prior trust for the accumulation of the whole income during a term of years not exceeding the legal limit, the Court has, in the absence of special circumstances, no jurisdiction to order an allowance to be paid out of the income for maintenance and education of the person who will, if he is living at the end of the term, be the tenant for life, even if there

is no other way in which a provision can be made for his maintenance and education, *Re Alford*, 32 Ch. D. 383; 55 L. J. Ch. 659. As to what will constitute special circumstances, see *Havelock* v. *Havelock*, 17 Ch. D. 807; 50 L. J. Ch. 778, in which case, however, the devisee entitled to the accumulations in the event of the infants dying under age consented to the order for maintenance. This circumstance is not referred to in the headnote to the report in 17 Ch. D. 807, and has been frequently overlooked.

Where there was a direction in the will to set apart the legacy, the Court of Appeal held that this amounted to a gift of the intermediate income, *Re Medlock*, 55 L. J. Ch. 738. See *Re Clements*, [1894] 1 Ch. 665; 63 L. J. Ch. 326; *Re Woodin*, [1895] 2 Ch. 309; 64 L. J. Ch. 501.

In *Brophy* v. *Bellamy*, L. R. 8 Ch. 798; 43 L. J. Ch. 183, where trustees of a will were authorised to apply income of presumptive shares towards the maintenance of infants, notwithstanding the father's ability, the Court, in a suit for administration of the estate, would not control the discretion of the trustees, and at the request of the trustees made an order for payment of the income of a fund in Court to the father, on his undertaking to apply it for the benefit of the infants. In *Re Bryant*, [1894] 1 Ch. 324; 63 L. J. Ch. 197, trustees who had a discretionary power to allow maintenance declined to exercise the power, the mother of the infants having an ample income and maintaining them sufficiently, and the Court refused to interfere with the trustees in the exercise of their discretion. In *Re Howarth*, L. R. 8 Ch. 415; 42 L. J. Ch. 316, it was held that on an application by an infant for maintenance, the Court has jurisdiction, without suit, to charge expenses of past maintenance and the costs of the application on the *corpus* of freeholds to which the infant was entitled in fee simple. But see *Cadman* v. *Cadman*, 33 Ch. D. 397; 55 L. J. Ch. 833, where *Re Howarth* was doubted. And see *Re Badger*, [1913] 1 Ch. 385; 82 L. J. Ch. 264, where *Cadman* v. *Cadman* was followed.

(*f*) A power of advancement to the extent of one-half of a presumptive or vested share or interest is, in the case of trusts constituted or created after 1925, conferred upon trustees by sect. 32 of the Trustee Act, 1925, so that, unless it is desired to exceed that amount, a power of advancement is not now required.

(*g*) See note (*f*), Prec. 12.

No. VIII.

WILL *of* MARRIED MAN *leaving all his Property after certain legacies to Trustees for Conversion, to pay Debts and Legacies and to invest the Surplus; Income to Wife during Widowhood; Capital among Children equally at Twenty-one or Marriage.—Settlement of Shares of Daughters.—Substitution of Grandchildren for Children dying before Testator.—On Failure of previous Trusts, as Wife shall appoint; in Default for Persons entitled on Intestacy.—Power to postpone Conversion.—Powers*

PREC. 8.

to vary Investments, Advancement, &c.—Appointment of Guardians.

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Appointment of executors.

2. I APPOINT —— and —— executors and trustees of this my will.

Furniture and personal effects.

3. I BEQUEATH to my wife [*name*] absolutely all my clocks watches jewels trinkets personal ornaments and wearing apparel and all my household furniture plate plated articles linen glass china books except books of account manuscripts pictures drawings prints etchings photographs statuary musical instruments articles of vertu wines liquors and consumable stores and provisions horses mares ponies carts carriages motor-cars harness saddlery coach-house stable and garage furniture and utensils plants garden tools and implements farming stock both live and dead and all other articles of personal domestic or household use or ornament (*a*) [free of duty].

4. [*Immediate legacy to wife as in Prec.* 6, *clause* 3.]

5. I BEQUEATH the following legacies that is to say To each of my executors £—— as an acknowledgment for the trouble of executing my will (*b*) To &c. (*c*).

Real and residue of personal estate to trustees;

—sale and conversion;

trusts of proceeds;

6. As to all the rest of my estate and effects both real and personal I DEVISE AND BEQUEATH the same unto my trustees hereinbefore named UPON TRUST that my trustees shall sell and convert into money my said real and residuary personal estates or such parts thereof as shall be of a saleable or convertible nature and get in the other parts thereof (*d*) AND I direct my trustees to hold the moneys to arise from such sale conversion and getting in and any ready money I may die possessed of UPON TRUST thereout in the first place to pay the expenses incidental to the execution of the preceding trust and my debts and funeral and testamentary expenses AND in the next place to pay the pecuniary legacies hereinbefore bequeathed and to invest the surplus of the said moneys AND upon further trust to pay the income of the said moneys and investments to my wife [*name*] during her life if she shall so long continue my widow AND from and after her death or future marriage as to as well the capital as the income of the said moneys and investments UPON TRUST for such of my children as being sons shall attain the age of twenty-one years or being daughters shall attain that age or be married under that age such children if more than one to take in equal shares BUT I DECLARE that the share of each daughter (*e*) shall be retained by my trustees and

income to wife, during widowhood;

capital to children.

Settlement of the shares of daughters;

held by them UPON TRUST to pay the income thereof to my daughter entitled thereto for her separate use during her life without power of alienation or anticipation AND from and after the death of my same daughter as to as well the capital as the income thereof UPON TRUST for all or any one or more of the issue of my same daughter in such proportions and for such interests to be absolutely vested within twenty-one years from her death as she whether covert or discovert shall from time to time by deed with or without power of revocation and new appointment or by her will or a codicil thereto appoint BUT no child in whose favour or in favour of any of whose issue an appointment shall be made shall participate under the trust next hereinafter contained in the unappointed portion of the said settled fund without bringing the benefit of such appointment into hotchpot AND in default of appointment or subject to any partial appointment IN TRUST for the children of my same daughter who shall being sons attain the age of twenty-one years or being daughters attain that age or be married under that age such children if more than one to take in equal shares AND if there shall not be any child of my same daughter who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then IN TRUST for such person or persons for such interests and generally in such manner in all respects as my same daughter shall by will or codicil appoint AND in default of and subject to any such appointment IN TRUST for such person or persons as would under the Administration of Estates Act 1925 have become entitled to the said trust premises at her death had she been absolutely entitled thereto and died intestate a spinster and domiciled in England such persons if more than one to take the shares which they would have taken under that Act.

—issue of daughter as she shall appoint;

hotchpot;

—in default for children equally;

—if no child,

—as daughter shall by will appoint;

—daughter's next-of-kin.

7. I EMPOWER my same daughter (notwithstanding the trusts herein contained in her favour) by deed executed either after or in contemplation of her marriage or by will or codicil to appoint the annual income to accrue due after her death of the said settled fund or any part of such income to and for the life of any husband of my same daughter who shall survive her.

Daughter empowered to appoint a life interest to her husband.

8. [*Substitutionary clause and the following provisions as in Prec.* 7, *clause* 6.]

9. I EMPOWER my trustees to postpone for such period as they shall judge expedient the sale conversion or getting in of my real and personal estates or any part thereof respectively.

—to postpone conversion;

10. I DECLARE that for the purposes of enjoyment and transmission under the trusts herein contained my real estate shall be considered as money from the time of my death AND that

—constructive conversion from testator's death;

PREC. 8.

—rents, &c., to be deemed income.

the rents dividends interest and other yearly produce of my real and personal estates respectively to accrue due after my death and until the actual sale conversion and getting in thereof shall as well during the first year after my death as in subsequent years be deemed the income thereof applicable as such for the purposes of the said trusts without regard to the amount of such income or to the wasting or hazardous nature of the investments yielding the same AND that as between the capital and income of my estate no apportionment of rents dividends or other periodical payments shall take place for or in respect of the period current at my death (*f*).

Restriction upon power to vary investments.

11. I DECLARE that so long as any person not under any disability shall for the time being be entitled to receive the income of the trust fund as tenant for life the power to vary investments shall not be exercised without the previous consent in writing of such person.

Advancement.

12. I EMPOWER my trustees with the consent of the respective persons having prior interests if any and if none at the discretion of my trustees to raise any part or parts not exceeding in the whole two-thirds (*g*) of the expectant presumptive or vested share of any infant in the trust premises under the trusts hereinbefore contained and to pay or apply the same for the advancement or benefit of such infant.

Appointment of guardians.

13. I APPOINT —— and —— to be guardians of my infant children to act jointly with my said wife during her life and also after her death jointly with the guardians or guardian if any whom she may have appointed (*i*).

14. *Investment clause.* See note (*b*) to Prec. 4.

15. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c. (*k*).

NOTES to Precedent 8.

(*a*) For a short form of a bequest of personal effects, see Prec. 6, clause 4. It often happens that particular articles which the testator would have wished to be the subject of a specific bequest are left to pass under the general words of such a bequest as this, or to pass to a residuary legatee. It would be well, therefore, to inquire whether the testator attaches any particular value to such of the following articles as he may possess or desires any particular one of the following items of property to be included in or excepted from a general gift.

1. Time-pieces, clocks, watches.

2. Jewels, necklaces, pendants, ear-rings, brooches, tie-pins, bracelets, bangles, watch-chains, paste ornaments.

3. Military, naval, civil, masonic, or athletic prizes, medals, or decorations, *Brooke* v. *Warwick*, 2 De G. & S. 425.

4. Pewter or enamel articles.

5. Silks furs or lace.

NOTES TO PREC. 8.

6. Books, albums, portfolios, manuscripts, *Willis* v. *Curtois*, 1 Be. 189; 8 L. J. (N.S.) Ch. 105; *Re Fortlage*, [1916] W. N. 214 (stamp album), disapproved in *Re Masson*, [1917] W. N. 252; 86 L. J. Ch. 753.

7. Portraits, pictures, pastels, drawings, sketches, cartoons, engravings, lithographs, prints, etchings, mezzotints, aquatints, photographs, photogravures, statuary, bas-reliefs, *Re Whaley*, [1908] 1 Ch. 615; 77 L. J. Ch. 367; *Re Layard*, 85 L. J. Ch. 505; *Re Du Maurier*, 32 T. L. R. 579.

8. Artistic and scientific utensils and appliances; *e.g.*, easels, paints, paint-brushes, telescopes, sextants, photographic cameras, &c., *Brooke* v. *Warwick*, *ubi sup.*

9. Musical instruments, pianolas, player-pianos, phonographs, gramophones, musical boxes.

10. Horses, mares, ponies, jennets, donkeys, mules, colts, foals, fillies.

11. Carts, carriages, broughams, landaus, ralli-carts, governess-carts, dog-carts, outside-cars, phaetons, victorias, waggons, waggonettes, gigs, drays; saddlery, harness-sets, saddles, spurs, driving and riding whips, hunting-crops; motor cars, auto-cars, motor and other bicycles; airships, aeroplanes, monoplanes, biplanes; stable, coach-house and garage furniture and utensils, *Re Howe*, [1908] W. N. 223; *Re Hall*, [1912] W. N. 175; *Re Ashburnham*, [1912] W. N. 234; *Re White*, [1916] 1 Ch. 172; 85 L. J. Ch. 368; *Re Fortlage*, [1916] W. N. 214; *Re Sivewright*, 67 S. J. 168.

12. Yachts, launches, boats, canoes, punts, oars, sculls, paddles, punting-poles.

13. Firearms, cannons, guns, air-guns, rifles, fowling-pieces, pistols, swords, lances, daggers, dirks, shields, bows, arrows, weapons.

14. Garden tools and implements, plants in pots, orchids, &c., *Re Owen*, 78 L. T. 643; farming stock both live and dead, farming implements, *Blake* v. *Gibbs*, 5 Russ. 13, n.; *Swinfen* v. *Swinfen*, 29 Be. 207; 4 L. J. (N.S.) Ch. 194; *Burbridge* v. *Burbridge* 16 W. R. 76; 37 L. J. Ch. 47.

15. Musical, dramatic or literary copyrights, Copyright Act, 1911, ss. 5 (2), 17 (2).

16. Dogs, cats, birds, domestic pets, *Cole* v. *Fitzgerald*, 1 S. & St. 189; 3 Russ. 301 and note; *Re Fothergill*, Sol. J. vol. 60, p. 652.

17. Collections of moths, butterflies, postage-stamps, autographs, coins, curios, &c., *Dutton* v. *Hockenhull*, 22 W. R. 701; and as to stamps, see cases under 6 above.

See note (*d*) to Prec. 5. And see Jarm. Wills, ch. 35, iv. B (2).

Bequests of household furniture.

Household furniture comprises everything that contributes to the use or convenience of the householder, or the ornament of the house, *Kelly* v. *Powlet*, Amb. 605. In that case books were held not to pass; but under a gift of the testator's furniture and all his other articles of domestic use or ornament, books have been held to pass, *Cornewall* v. *Cornewall*, 12 Sim. 303; 10 L. J. Ch. 364. Where a testator devised his dwelling-house, *garden and premises* to E. for her life, "and also all and singular the household furniture and other household effects" of and belonging to him in the said dwelling-house *and premises* at the time of his decease, not only books, but wines and liquors, turning-lathes and a sawing-machine, a stock of ivory and mahogany, and a pair of pistols, were held to be included, *Cole* v. *Fitzgerald*, 1 S. & St. 189; 1 L. J. (O.S.) Ch. 91, and V.-C. Shadwell was of opinion that a pony, cow, and four fowling-pieces would pass if proved to be kept for the (use and) defence

NOTES TO PREC. 8.

of the house, and that a haystack, if for use, would pass, but not if it were for sale; see the same case, on appeal, 3 Russ. 301. Books and wines were held to pass by a bequest of all the testator's "furniture, linen, plate, pictures, carriages, horses, and other live and dead stock in his use and possession," *Hutchinson* v. *Smith*, 1 N. R. 513. In a bequest of all the furniture "except plate and pictures" in the testator's house at his death, it was held that the exception applied only to plate properly so called, and not to plated goods, *Holden* v. *Ramsbottom*, 4 Gif. 205. Under a bequest of all the goods and chattels whatsoever in and about testator's dwelling-house and outhouses at T. at his death, it was held that running-horses passed, *Gower* v. *Gower*, 2 Ed. 201. In *Brooke* v. *Warwick*, 2 De G. & S. 425, telescopes were held to pass under the words "household furniture"; and under a bequest of the pictures and books which might be at testator's death in, upon or about his mansion, it was held that pictures removed from the mansion to be cleaned, and books sent to be repaired, passed; but that articles purchased for the mansion, but not sent home at testator's death, did not pass; but as to these last-mentioned articles, compare *Field* v. *Peckett*, 29 Be. 573; 30 L. J. Ch. 813. So also in *Pellew* v. *Horsford*, 25 L. J. Ch. 352, an astronomical clock, which had been thirty years at a chronometer maker's, who had directions to sell it if a fair price could be obtained, passed under the specific bequest of testator's "household furniture." See also *Willis* v. *Curtois*, 1 Be. 189; 8 L. J. (N.S.) Ch. 105; *Domville* v. *Taylor*, 32 Bea. 604; *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302. Where a testator bequeathed as follows: "all my interest in my house at L., the furniture, books, pictures, wines, &c., &c.," and after the date of his will removed from L., taking his furniture, &c., with him to S., where he afterwards purchased more of such articles, and subsequently died at S., it was held that the legatee was entitled to the furniture, books, pictures, wines and plate, which the testator had at his death, *Norris* v. *Norris*, 2 Col. 719; 15 L. J. Ch. 420; but see *Colleton* v. *Garth*, 6 Sim. 19; 2 L. J. (N.S.) Ch. 75; *Houlding* v. *Cross*, 1 Jur. (N.S.) 250. Words of locality thus placed in connection with gifts of chattels often render it doubtful whether they are intended to restrict the gift to the chattels actually at the locality referred to; but a general gift of all in a certain locality "or elsewhere" will pass the general personal estate, *In b. Scarborough*, 6 Jur. (N.S.) 1166; 30 L. J. P. 85. A gift of furniture in a particular house will not pass plate sometimes there used, sometimes elsewhere, *Wilkins* v. *Jodrell*, 11 W. R. 588. See *Re Earl of Stamford*, 111 L. T. 937, as to the effect of moving plate from one house to another where both belonged to the testator. Under a bequest of "household effects of every description and all other the contents of the said dwelling-house," jewellery deposited at a bank was held to pass as notionally in the house, *Re Lea*, 104 L. T. 253; but see *Re Baroness Zouche*, [1919] 2 Ch. 178. A bequest of "household furniture" has been held to carry tenant's fixtures, *Paton* v. *Sheppard*, 10 Sim. 186; but, as a general rule, such a bequest will not pass the tenant's fixtures in a leasehold house occupied by the testator, *Finney* v. *Grice*, 10 Ch. D. 13; 48 L. J. Ch. 247; *Re Seton-Smith*, [1902] 1 Ch. 717; 71 L. J. Ch. 386. See also Amos & Ferard, On Fixtures, 248 *et seq.*; and see *Norton* v. *Dashwood*, [1896] 2 Ch. 497; 65 L. J. Ch. 737; and *Re Chesterfield's Settled Estates*, [1911] 1 Ch. 237; 80 L. J. Ch. 186. The cases on bequests of "household furniture," "household goods," and "household stuff," will be found collected in 1 Rop. Leg. 253 *et seq.*; see also Jarm. Wills, ch. 35

Bequests of household furniture.

Words of locality as applied to chattels.

Fixtures.

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Manning v. *Purcell*, 7 D. M. & G. 55; 24 L. J. Ch. 522; *Tempest* v. *Tempest*, 2 K. & J. 635; 26 L. J. Ch. 501.

Bona quæ ipso usu consumuntur.

Wines and other consumable stores should always be given to the legatee absolutely, and no attempt be made to create life or other temporary interests in property of this description, of which the enjoyment consists in their consumption. Indeed, the effect of giving a life interest in consumable articles is to entitle the legatee absolutely, *Randall* v. *Russell*, 3 Mer. 194; *Andrew* v. *Andrew*, 1 Col. 690; see also *Twining* v. *Powell*, 2 Coll. 262. But this does not apply to the stock-in-trade of a wine merchant, *Phillips* v. *Beal*, 32 Be. 25, or to farming stock and implements of husbandry, *Groves* v. *Wright*, 2 K. & J. 347; *Myers* v. *Washbrook*, [1901] 1 K. B. 360; 70 L. J. K. B. 357, or other consumable articles forming part of the stock-in-trade of a business bequeathed to one for life, *Cockayne* v. *Harrison*, L. R. 13 Eq. 432; 41 L. J. Ch. 509; *Re Powell*, [1921] 1 Ch. 178. A gift of farming implements and stock to a person for life, but with a direction that he is not to be liable to account for depreciation, carries the absolute interest, *Breton* v. *Mockett*, 9 Ch. D. 95; 47 L. J. Ch. 754. As to wearing apparel, see *Re Hall's Will*, 1 Jur. (N.S.) 974. Deer in a park do not belong to this class of things, *Paine* v. *Warwick* (*Countess*), [1914] 2 K. B. 486; 83 L. J. K. B. 895.

Consumable articles.

A distinction, however, is to be taken between a specific and a residuary gift for life of goods *quæ ipso usu consumuntur*: if the gift is specific, it is an absolute gift of the property, but if residuary, the things must be sold, the produce invested, and the interest thereof paid to the legatee for life. See 2 Wms. Exors. 1127.

Personal chattels.

A gift of "personal chattels as defined by section 55 (1) (x) of the Administration of Estates Act, 1925," would include the articles there enumerated. See Miscellaneous Forms, *post*, p. 362.

(*b*) Compare Prec. 11, clause 17, and see note (*l*) thereto.

(*c*) As to legacies to charities, see Prec. 24, clause 6, and note.

(*d*) Trustees for sale can sell minerals apart from surface by virtue of sect. 28 of the Law of Property Act, 1925, and sect. 50 of the Settled Land Act, 1925. Their powers in that respect before 1926 were under sect. 44 of the Trustee Act, 1893, as amended by sect. 3 of the Trustee Act, 1894, and sect. 17 of the Settled Land Act, 1882. As to a sale by mortgagees, see sects. 92 and 101 of the Law of Property Act, 1925. After 1925 a power to postpone sale is implied in the case of every trust for sale of land under sect. 25 of the Law of Property Act, 1925, and the trustees have powers of management under sect. 28 of that Act.

(*e*) In *Re Dowling's Trusts*, L. R. 14 Eq. 463, the gift was in trust for all the testator's children who being sons should attain twenty-one, or being daughters should attain that age or marry, and if any of his children should die before attaining a vested interest leaving issue, their shares to go to their children, with a proviso that on the marriage of any daughter a moiety of her share should be settled; it was held that the proviso applied only to marriage under twenty-one, and that a daughter who had attained twenty-one and not married was absolutely entitled to the whole of her share.

If the trusts of a daughter's share do not exhaust the whole interest originally given to her, the absolute interest remains subject to the trusts so far only as they are effectual, *Hancock* v. *Watson*, [1902] A. C. 14; *Re Cohen*, [1915] W. N. 361; *Re Harrison*, [1918] 2 Ch. 59; 87 L. J. Ch. 433.

(*f*) It is enacted by 33 & 34 Vict. c. 35, that from August 1, 1870,

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Apportionment Act, 1870.

"all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." The Act does not apply to policies of assurance (sect. 6), and its provisions do not extend to any case in which it is expressly stipulated that no apportionment shall take place (sect. 7); *Re Edwards*, [1918] 1 Ch. 142; 87 L. J. Ch. 248.

See, as to this Act, *Clive* v. *Clive*, L. R. 7 Ch. 433; 41 L. J. Ch. 386; and as to its affecting the construction of a will of earlier date, *Jones* v. *Ogle*, L. R. 8 Ch. 192; 42 L. J. Ch. 334. In *Whitehead* v. *Whitehead*, L. R. 16 Eq. 528, it was held that dividends on shares specifically bequeathed were not apportionable as between the specific legatee and the testator's estate: but see *Pollock* v. *Pollock*, L. R. 18 Eq. 329; 44 L. J. Ch. 168. The rents of real estate devised are apportionable between the executor of the testator and the devisee, *Capron* v. *Capron*, L. R. 17 Eq. 288; 43 L. J. Ch. 677, whether the devise is residuary or specific, *Hasluck* v. *Pedley*, L. R. 19 Eq. 271; 44 L. J. Ch. 143; see also *Re Ford*, [1911] 1 Ch. 455; 80 L. J. Ch. 355. And the Act applies to all instruments whether coming into operation before or after the passing of the Act, *Re Cline's Estate*, L. R. 18 Eq. 213; *Hasluck* v. *Pedley*, *ubi sup.*; *Constable* v. *Constable*, 11 Ch. D. 681; 48 L. J. Ch. 621. A share of profits of a newspaper was not within the Act, *Re Cox's Trusts*, 9 Ch. D. 159; 47 L. J. Ch. 735; but a bonus to the shareholders of a public company was apportioned, *Re Griffith*, 12 Ch. D. 655, distinguished in *Re Sale*, [1913] 2 Ch. 697; 83 L. J. Ch. 180. And as to dividends declared after the death of a tenant for life, see *Re Muirhead*, [1916] 2 Ch. 181; 85 L. J. Ch. 598; *Re Edwards*, 1918, 1 Ch. 142; and see *Re Wakley*, [1920] 2 Ch. 205; *Re Marjoribanks*, [1923] 2 Ch. 307; 92 L. J. Ch. 609. In *Swansea Bank* v. *Thomas*, 4 Ex. D. 94; 48 L. J. Ex. 344, the Act was applied in a case between lessor and the trustee of a liquidating lessee; but see the reporter's query. Parish rates are not within the Act, *Re Wearmouth Crown Glass Co.*, 19 Ch. D. 640.

(*g*) See sect. 32 of the Trustee Act, 1925, which empowers trustees to make an advancement to the extent of one-half.

(*i*) See note (*f*), Prec. 12.

(*k*) The dispositions of the testator's property effected by this and the preceding form are substantially the same; but in Prec. 7 the trustees' powers of management, investment, &c., are intermingled with the beneficial trusts, thereby interfering, to some extent, with the continuity, and preventing an easy grasp of the general effect of the will: whereas in Prec. 8 the trusts are first declared, in the simplest form, unencumbered by any details, and the ancillary powers are relegated to the latter part of the will. It is submitted that this is the preferable course, and that clauses and provisions which are nothing more than machinery for carrying out the will should not be interspersed amongst the disposing clauses. The trustees' powers are only means to an end, which is shown by the trusts declared, and the means should not obscure the end. It is a great advantage when the general effect of a will can be readily understood by layman and lawyer alike, and it is conceived that this advantage is likely to be best attained if the principal trusts, defining the extent of the interest of the beneficiaries, are kept distinct from the secondary powers, defining the authority of the trustees and indicating their *modus operandi*.

No. IX.

PREC. 9.

WILL *of a* MARRIED WOMAN, *having no issue, disposing of Real Estate and a Money Fund, over both of which she has Powers of appointment, and of her separate Property, in favour of her Husband and collateral Relations. —Appointment of the Real Estate for the Husband for Life; for the separate Use of a Married Sister for Life; for the Sister's Husband for Life; for her Issue, as she shall appoint; for her Children and Children of deceased Children, at twenty-one, &c.; for such Persons as she shall appoint; for the Survivor of her Sister and her Husband in Fee.—Appointment of the Money Fund to Trustees to be disposed of as Part of the Residue.—Bequest of Specific Legacies.—Bequest of the Residue to Trustees, to pay Pecuniary Legacies and Annuities; Funds to be set apart to answer the Annuities; Ultimate Trust for Brothers and Sisters equally.*

THIS IS THE LAST WILL of me [*name*] the wife of [*husband's name residence and quality*] to take effect in the event only of my not leaving any issue living at my death.

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT —— and —— executors and trustees of this my will and trustees thereof for the purposes of the Settled Land Act 1925 (*a*). Appointment of executors.

3. WHEREAS under the will of [*name*] dated the —— day of —— 19— and proved on the —— day of —— 19—— [*or* WHEREAS by an Indenture of Settlement dated the —— day of —— 19— and made between —— of the first part —— of the second part —— of the third part] I have a general power of appointment by will over certain freehold hereditaments situate at —— in the county of —— (*b*) Now in exercise of the said power and of every other power now or at the time of my death hereunto enabling me I APPOINT the said hereditaments upon the trusts following (namely) UPON TRUST for my husband for his life without impeachment of waste With remainder UPON TRUST for my sister [*name*] the wife of [*name, &c.*] for her life without impeachment of waste (*bb*) and without power of anticipation With remainder UPON TRUST for the said [*husband of testatrix's sister*] for his life without impeachment of waste With remainder UPON SUCH TRUSTS for the benefit of all or any one or more of the children and other issue of my said sister by her present or any future husband [*or* of my said sister by the said

RECITAL of power of appointing real estate.

APPOINTMENT of such real estate;

—to testatrix's husband for life;

—to trustees, for the separate use of a married sister for life:

—for the sister's husband for life;

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(*husband*)] such other issue being born in her lifetime as she shall by deed or will appoint And in default of appointment UPON TRUST for all or any the children or child of my said sister [*or* of my said sister by the said (*husband*)] living at the death of the survivor of myself and my said sister and the children or child then living of any then deceased child of hers [*or* of hers by the said (*husband*)] who whether children or grandchildren being male attain the age of twenty-one years or being female attain that age or marry if more than one in equal shares as tenants in common but so that the children of any deceased child of hers [*or* of hers by the said (*husband*)] shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and my said sister and attained a vested interest (*c*) And subject to the trusts and powers aforesaid as to the entirety UPON SUCH TRUSTS as my said sister shall by her will appoint And in default of appointment UPON TRUST for the survivor of them my said sister and her said husband [*name*] in fee simple.

—for the sister's children and issue, as she shall appoint;

—for the sister's children and children of deceased children at 21, &c.;

—upon such trusts as the sister shall by will appoint;

—for the survivor of the sister and her husband in fee.

RECITAL of power of appointing settled funds;

4. WHEREAS under the settlement made in contemplation of my marriage with my husband by indenture dated the —— day of —— 19— I have subject to the trusts therein contained in favour of myself and my husband successively for life and in favour of the children of our marriage of which there has not been any issue a general power of appointing by my will certain moneys stocks funds and securities thereby settled AND WHEREAS I am possessed as my separate property of certain personal estate Now in exercise of the said power given to me by the said settlement and of every other power now or at the time of my death hereunto enabling me I DIRECT the said money stocks funds and securities to be paid or transferred on the determination of the trusts prior to my said power of appointment to the said [*trustees*] and to be disposed of by my trustees as part of the residue hereinafter bequeathed of my separate personal estate and I DISPOSE of my separate personal estate in manner following.

—that testatrix is possessed of separate property.

APPOINTMENT of settled funds to executors, to be disposed of as separate property.

Disposition of separate property.

5. I BEQUEATH to my husband the use during his life of the plate on which my family crest is engraven he signing an inventory thereof to be kept by my trustees.

—use of plate to husband for life;

—watch, &c., to sister;

6. I BEQUEATH to my said sister my said plate (subject to my said husband's right to use the same for his life) also my watch with the chain and seals and my jewels trinkets and other ornaments of my person.

—apparel to servant.

7. I BEQUEATH to my servant [*name*] if she shall be in my service at the time of my death and not be under notice to leave whether given or received all my wearing apparel. *See note* (*m*) *to Prec.* 11, *post*, p. 203.

8. I DIRECT the said legacies hereinbefore bequeathed to be delivered within one calendar month (*d*) after my death.

Delivery of legacies.

9. I BEQUEATH to the said [*trustees*] the residue of my separate personal estate UPON TRUST that my trustees shall thereout pay the pecuniary legacies and annuities following (namely) A legacy of £—— to my husband A legacy of £—— to and for the separate use of my said sister such legacies to be paid within three calendar months (*d*) after my death A legacy of £—— to every son who shall attain the age of twenty-one years and every daughter who shall attain that age or be married of my said sister to be paid immediately after the same shall become vested and the receipt of any such daughter who has married shall notwithstanding her infancy be a discharge to my trustees for payment of the legacy to such daughter (*e*) An annuity of £—— to my servant [*name*] if she shall be in my service at the time of my death and not be under notice to leave whether given or received to be payable during her life (*f*) Also an annuity of £—— to [*name, &c.*] and [*christian name*] his wife and the survivor of them for their lives and the life of such survivor which several annuities shall begin from my death and be paid quarterly without deduction (*g*) AND I DIRECT my trustees to set apart within twelve months after my death in their names in any of the modes of investment hereinafter authorised (and not in any other investment) funds sufficient at the period of appropriation for answering the said annuities and after such appropriation the said residue shall be released from the same annuities AND as to the said RESIDUE subject to the trust and direction aforesaid (but inclusive of the funds to be set apart pursuant to such direction when and as the respective annuities payable thereout shall drop) UPON TRUST that my trustees shall pay or transfer the same to and equally among my brothers and sisters [*names*] [the shares of my sisters to be enjoyed and disposed of by them respectively as separate property (*h*)].

Residue of separate property to trustees;

—to pay pecuniary legacies;

—and life annuities.

Direction to set apart funds for answering annuities.

Ultimate trust for brothers and sisters:

sisters' shares for their separate use.

10. *Investment clause.* See note (*b*) to Prec. 4.

11. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 9.

(*a*) See note (*a*) to Prec. 5.

(*b*) It is provided by sect. 1 (7) of the Law of Property Act, 1925, that: "Every power of appointment over, or power to convey or charge land or any interest therein, whether created by a statute or other instrument or implied by law, and whether created before or after the commencement of this Act (not being a power vested in a legal mortgagee or an estate owner in right of his estate and exercisable by him or by another person in his name and on his behalf), operates only in equity."

NOTES TO PREC. 9.

(*bb*) Where it is intended that the *cestui que trust* shall enjoy the proceeds to arise from the fall of timber, &c., the estate of the trustees should be made unimpeachable for waste. A tenant for life, impeachable for waste, cannot cut timber at all, except periodically on a timber estate where the growth and cutting of timber is the mode of cultivation of the estate; but the general law as to what is timber is varied by the special customs of different localities, *Honywood* v. *Honywood*, L. R. 18 Eq. 306; 43 L. J. Ch. 652; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306; 60 L. J. Ch. 809. A tenant for life under a written instrument which expressly declares his estate to be without impeachment of waste, may cut timber in a husbandlike manner for his own benefit, may open mines, and commit other similar acts with impunity, *Waldo* v. *Waldo*, 12 Sim. 107; 10 L. J. Ch. 312; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & S. 75; but he cannot pull down or deface the family mansion, or fell ornamental timber, or commit other injuries of a like nature, *Wellesley* v. *Wellesley*, 6 Sim. 497; *Duke of Leeds* v. *Lord Amherst*, 2 Ph. 117. See also *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504; 26 L. J. Ch. 721; *Morris* v. *Morris*, 3 De G. & J. 323; 28 L. J. Ch. 329; *Gent* v. *Harrison*, Joh. 517; 29 L. J. Ch. 68; *Gordon* v. *Woodford*, 6 Jur. (N.S.) 59; 29 L. J. Ch. 222; *Weld-Blundell* v. *Wolseley*, [1903] 2 Ch. 664; 73 L. J. Ch. 45. And see sect. 135 of the Law of Property Act, 1925. And an owner in fee, whose estate is defeasible by an executory devise over on his dying without leaving issue living at his death, is, as to equitable waste, in the same position as a tenant for life unimpeachable for waste, *Turner* v. *Wright*, 2 D. F. & J. 234; 29 L. J. Ch. 598; *Blake* v. *Peters*, 1 D. J. & S. 345; 32 L. J. Ch. 200. Where tenant for life impeachable for waste cut timber, but not otherwise than in due course of management, he was held entitled to the income of the proceeds, and on his death the next tenant for life, who was dispunishable for waste, was held entitled to the capital, *Lowndes* v. *Norton*, 6 Ch. D. 139; 46 L. J. Ch. 613. And where tenant for life, unimpeachable for waste, cut ornamental timber, but under such circumstances that the Court would have directed it to be cut, he was held entitled to the proceeds, *Baker* v. *Sebright*, 13 Ch. D. 179; 49 L. J. Ch. 65. As to cutting ripe timber, where tenant for life is impeachable for waste, see sect. 66 of the Settled Land Act, 1925. See also, on the subject of waste in general, the notes to *Bowles' Case*, in Tud. L. C. R. P.; to *Garth* v. *Cotton*, in 1 Wh. & Tud. L. C. Eq., and the first chapter of Yool's Treatise on Waste, Nuisance, and Trespass. As to working new seams of an existing mine, see *Spencer* v. *Scurr*, 31 Be. 334; 31 L. J. Ch. 808; and as to abandoned or dormant mines, *Bagot* v. *Bagot*, 32 Be. 509; 33 L. J. Ch. 115. See also *Earl Cowley* v. *Wellesley*, 35 Be. 635; *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. 454, 466; 48 L. J. Ch. 811.

Waste.

Tenant for life.

Equitable waste.

Owner of defeasible fee.

Undivided shares.

(*c*) By sub-sect. (3) of sect. 34 of the Law of Property Act, 1925, it is provided that:—

"(3.) A devise bequest or testamentary appointment, coming into operation after the commencement of this Act, of land to two or more persons in undivided shares shall operate as a devise bequest or appointment of the land to the trustees (if any) of the will for the purposes of the Settled Land Act, 1925, or, if there are no such trustees, then to the personal representatives of the testator, and in each case (but without prejudice to the rights and powers of the personal representatives for purposes of administration) upon the statutory trusts hereinafter mentioned."

NOTES TO PREC. 9.

Under sect. 35 of the Act, where the "statutory trusts" are defined, land so given will be held upon trust for sale. Land which, before 1926, was held in undivided shares will henceforth be held subject to the provisions of Part IV. of the 1st Schedule to the Act.

When legacies are to be paid.

(*d*) By the ordinary rule, an executor is allowed, for the payment and satisfaction of pecuniary and specific legacies, twelve months from the testator's decease; this being considered a reasonable time for enabling him to ascertain the solvency of the estate, and get in the assets, *Benson* v. *Maude*, 6 Mad. 15; *Brooke* v. *Lewis*, *ib.* 358. An executor, however, may, if he chooses, discharge a legacy at an earlier period, since it is due at the testator's decease, and the postponement of a year is merely made for convenience, which may in some cases require less; for if the solvency of the estate is beyond all question, and the property is immediately available, there is no reason for deferring payment; and the adherence, in such circumstances, to the rule which allows a year, is an abuse of it. By sect. 44 of the Administration of Estates Act, 1925, it is enacted that a personal representative is, subject to the foregoing provisions of that Act, not bound to distribute the estate before the expiration of one year. Of course, a direction to pay or deliver legacies at an earlier period operates only as between claimants under the will and ought not, any more than the general rule which allows a year, to be acted upon by an executor until the ascertained circumstances of the estate justify the measure, in other words, until he is satisfied of its sufficiency to answer debts and legacies; if indeed, looking at the possible existence of latent demands, the sufficiency of the estate can ever be said to be completely ascertained.

Direction to pay at an earlier period.

In all wills coming into operation after 1925 "month" means calendar month, Law of Property Act, 1925, s. 61.

(*e*) As regards *income* a married infant can give a receipt under sect. 21 of the Law of Property Act, 1925, but an infant, in the absence of some such words as are here inserted, could not give a receipt for a legacy.

Annuity for life, or perpetual.

(*f*) The general rule is that where an annuity is given to a person by a will creating the annuity, the annuitant takes for life only, *Yates* v. *Maddan*, 3 M'N. & G. 532; 21 L. J. Ch. 24, and the authorities there discussed. A bequest of an annuity simply implies no more than a gift for life, unless there is something else in the will to enlarge the bequest, *Potter* v. *Baker*, 13 Be. 273; *Blewitt* v. *Roberts*, Cr. & Ph. 274; 10 L. J. Ch. 342; *Nichols* v. *Hawkes*, 10 Ha. 342; 22 L. J. Ch. 255; *Lett* v. *Randall*, 2 D. F. & J. 388; 30 L. J. Ch. 110; but the question is entirely one of intention, to be deduced from the words of the whole will, *Banks* v. *Braithwaite*, 32 L. J. Ch. 198. An annuity is perpetual where the testator indicates an intention to that effect by segregating and appropriating a portion of his property, from the profits of which the annuity is to be paid; or where the testator dedicates the whole of his property, or the whole of a fund, to the payment of annuities, in such a way as to show that he treats the annuities as a mode of calculating the shares which the annuitants take in the property or fund, *Stokes* v. *Heron*, 12 C. & F. 161. And an annuity to A. directed "to be purchased in the British funds," accompanied with a direction to sell certain lands, "the produce to go to the carrying out of the aforesaid annuity," was held to be perpetual annuity, *Kerr* v. *Middlesex Hospital*, 2 D. M. & G. 576; 22 L. J. Ch. 355; see, however, *Re Grove's Trusts*, 1 Gif. 74; 28 L. J. (N.S.) Ch. 536. A direction to buy an annuity in the public funds means to purchase such an amount in the funds as

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will suffice to produce the annuity; and where a fund is to be purchased for A., that fund so purchased belongs to A., *Ross* v. *Borer*, 2 J. & H. 469; 31 L. J. Ch. 709. And if a certain amount *per annum* is given, and on the construction of the whole will this is held to be a gift in perpetuity, but the testator has not specified out of what particular property or fund the annual sum is to be provided, the annuitant is entitled to the best security to be obtained, *Hill* v. *Rattey*, 2 J. & H. 634; 31 L. J. Ch. 380; *Hicks* v. *Ross*, [1891] 3 Ch. 499; 60 L. J. Ch. 853. See also *Hedges* v. *Harpur*, 3 De G. & J. 129; 27 L. J. Ch. 742; *Mansergh* v. *Campbell*, 3 De G. & J. 232; 28 L. J. Ch. 61; *Hicks* v. *Ross*, L. R. 14 Eq. 141; 41 L. J. Ch. 677; Hawkins, Constr. Wills, 162. In *Wilkins* v. *Jodrell*, 13 Ch. D. 564; 49 L. J. Ch. 26, the testator bequeathed an annuity to A., and in the event of her death to be continued to her children for their maintenance and education; the annuity endured throughout the life of the last survivor of A.'s children. In *Re Morgan*, [1893] 3 Ch. 222; 62 L. J. Ch. 789, annuities were bequeathed to several annuitants "or their descendants." It was held that the several annuitants took annuities for life only, with substitutionary gifts to the respective descendants, if any, living at the testator's death, of such of them as should not survive the testator. In *Townsend* v. *Ascroft*, [1917] 2 Ch. 14; 86 L. J. Ch. 517, a testator gave to his daughter an annuity of £30 for her life, with a general power of leaving it by will. The annuity was charged on the testator's real estate. The daughter married and by her will appointed "the said annuity of £30" to her daughter absolutely. It was held that the appointee was entitled to a perpetual annuity of £30. Also where a testator directed his trustees to pay a "further annuity" to his widow for the maintenance and education of his infant daughter till his daughter should attain the age of twenty-one, and the widow died during the minority of the daughter, it was held that the further annuity did not cease with the death of the widow, *Re Yates*, [1901] 2 Ch. 438; 70 L. J. Ch. 725.

Income of fund inadequate.

Another point which has frequently occurred in gifts of annuities is, whether, in the event of the annual income of the estate or fund out of which the annuity is payable proving inadequate for the purpose, the *corpus* or capital is applicable to supply the deficiency.

Cases in which *corpus* is not applicable to make good the deficiency.

The question is entirely one of intention, to be gathered from the words of the particular will. If the annuity is made payable out of the rents and profits of real estate devised to trustees, who are directed on the death of the annuitant, to convey the estate to others, *Foster* v. *Smith*, 1 Ph. 629; 15 L. J. Ch. 183; or out of the interest, dividends, and produce of a fund, followed by a trust to transfer the *corpus* on the death of the annuitant, expressed in words indicating an intention to leave the *corpus* undiminished, *Earle* v. *Bellingham*, 24 Be. 445; or if the testator in any way manifests an intention that the fund shall be preserved in its integrity during the life of the annuitant, and in that state go over, *Baker* v. *Baker*, 6 H. L. C. 616; 27 L. J. Ch. 417; *Michell* v. *Wilton*, L. R. 20 Eq. 269; 44 L. J. Ch. 490, then the *corpus* is not applicable to make good the deficiency. See also *Miller* v. *Huddlestone*, 3 M'N. & G. 513; 21 L. J. Ch. 1; *Hindle* v. *Taylor*, 20 Be. 109; *Addecott* v. *Addecott*, 29 Be. 460; *Sheppard* v. *Sheppard*, 32 Be. 194. But where real estate is devised subject to and chargeable with the payment of an annuity, *Picard* v. *Mitchell*, 14 Be. 103; *Byam* v. *Sutton*, 19 Be. 556; or a residue is given "from and after payment" of an annuity "and subject thereto," *Birch* v. *Sherratt*, L. R. 2 Ch. 644; 36 L. J. Ch. 925;

Cases in which *corpus* is applicable.

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Re Mason, 8 Ch. D. 411; 47 L. J. Ch. 660; or where chattels real are charged with an annuity, and there is no direction that the annuity is to be paid out of income only, *Pearson* v. *Helliwell*, L. R. 18 Eq. 411; or if the testator directs the setting apart or the investment of so much money as will produce a certain annual sum, *May* v. *Bennett*, 1 Rus. 370; *Wright* v. *Callender*, 2 D. M. & G. 652; 21 L. J. Ch. 787; *Mills* v. *Drewitt*, 20 Be. 632; 48 L. J. Ch. 266; *Miner* v. *Baldwin*, 1 S. & G. 522; *Bright* v. *Larcher*, 3 De G. & J. 148; 28 L. J. Ch. 837; *Carmichael* v. *Gee*, 5 App. Cas. 588; 49 L. J. Ch. 829; or if the testator directs that not only the interest of a fund, but the fund itself, is to be held in trust to pay an annuity, *Hickman* v. *Upsall*, 2 Gif. 124; or if there be a gift of rents and profits or income, without restriction as to time, for the purpose of meeting the annuity, followed by a gift over of the residue, *Phillips* v. *Gutteridge*, 3 D. J. & S. 332; 32 L. J. Ch. 1; but compare *Stelfox* v. *Sugden*, Joh. 234; then the *corpus* is applicable to make good the deficiency. In *Booth* v. *Coulton*, L. R. 5 Ch. 684; 39 L. J. Ch. 622; and *Taylor* v. *Taylor*, L. R. 17 Eq. 324; 48 L. J. Ch. 314, annuities were held to be a continuing charge on rents and profits, but not a charge on the *corpus* of the estate, which in the latter case was devised in strict settlement. The principal of the cases quoted in this paragraph are reviewed and distinguished in *Re Boden*, [1907] 1 Ch. 132; 76 L. J. Ch. 100; *Re Bigge*, [1907] 1 Ch. 714; 76 L. J. Ch. 413 (overruled by *Re Watkins' Settlement*, [1911] 1 Ch. 1; 80 L. J. Ch. 102); *Re Howarth*, [1909] 2 Ch. 19; 78 L. J. Ch. 687. In effect there can be but little distinction between a continuing charge on income and a charge on *corpus*. See *Re Young*, [1912] 2 Ch. 479; 81 L. J. Ch. 817, in which *Taylor* v. *Taylor* was treated as overruled by *Re Howarth*. An appropriation can, after 1925, be made of property to provide for an annuity under sect. 41 of the Administration of Estates Act, 1925.

When an annuity charged upon the *corpus* of settled real estate is in arrear, the Court has power to order the arrears to be raised by sale or mortgage of the estate, but the making of such an order is a matter, not of course, but of discretion, *Re Tucker*, [1893] 2 Ch. 323; 62 L. J. Ch. 442. And see *Hambro* v. *Hambro*, [1894] 2 Ch. 564; 63 L. J. Ch. 627.

Marshalling.

As to marshalling funds or estates for the payment of annuities, see *Fielding* v. *Preston*, 1 De G. & J. 438; *Yates* v. *Yates*, 28 Be. 637; 29 L. J. Ch. 872.

Where an annuity was left to A., to be paid by the testator's executor and residuary legatee B., who was empowered to require A. to attend personally at a particular place to give receipts, it was doubted whether such a condition was good; but whether good or not, it was held that the annuity was assignable, *Arden* v. *Goodacre*, 11 C. B. 883; 21 L. J. C. P. 129.

Registration.

Annuities given by will were not required to be registered under 18 & 19 Vict. c. 15, see sect. 14; and no annuity is to be entered in the register of annuities after 1925, Land Charges Act, 1925 (15 Geo. 5, c. 22), s. 4.

Annuities should, in general, be given free from legacy duty, 7 Byth. Jarm. 824.

Gift of an annuity "free from taxes"; annuitant pays the income tax.

A gift by will of an annuity or of a rentcharge "clear of legacy duty and every other deduction whatsoever," will not exempt the person entitled to the annuity or charge from payment of the property or income tax. See 5 & 6 Vict. c. 35, ss. 73, 102, 103; 16 & 17 Vict. c. 34, now repealed and consolidated in the Income Tax Act, 1918 (8 & 9

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Geo. 5, c. 40). The thing that is given is the thing that is to pay the tax, *Wall* v. *Wall*, 15 Sim. 513; 16 L. J. Ch. 305; and the income tax is not properly a deduction out of the estate or legacy, but a charge which the legislature has fixed on the person himself who receives the benefit, *Lethbridge* v. *Thurlow*, 15 Be. 335; 21 L. J. Ch. 538. See also *Sadler* v. *Rickards*, 4 K. & J. 302; *Abadam* v. *Abadam*, 33 Be. 475; 33 L. J. Ch. 593; *Peareth* v. *Marriott*, 22 Ch. D. 182; 52 L. J. Ch. 221; *Re Saillard*, [1917] 2 Ch. 401; 86 L. J. Ch. 749; *Re Loveless*, [1918] 2 Ch. 1; 87 L. J. Ch. 461. But a testator may so explain the word "deduction" as to show that he intends it to include income tax, and then effect will be given to his intention, *Turner* v. *Mullineux*, 1 J. & H. 335; *Re Buckle*, [1894] 1 Ch. 286; 63 L. J. Ch. 330; *Re Shrewsbury Estate Acts*, [1924] 1 Ch. 315. As to super tax, see *Re Crawshay*, [1915] W. N. 412; *Re Bowring*, [1918] W. N. 265; *Re Crosse*, [1920] 1 Ch. 240; 89 L. J. Ch. 145; *Re Doxat*, 64 S. J. 651; *Re Bowen*, [1925] W. N. 206; *Re Bates*, [1925] 1 Ch. 157; 94 L. J. Ch. 190. Where a testator devised a mansion and lands to his wife for life, and directed his trustees, out of the rents of other real estates, during the wife's life to insure and repair and pay all taxes, parliamentary, parochial, or otherwise, affecting the hereditaments given to his wife, it was held that income tax came within the words "affecting the hereditaments," that the direction did not contravene the terms of the Income Tax Acts, and that the trustees were bound to pay the income or property tax payable in respect of the widow's interest, *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & S. 62; 31 L. J. Ch. 503. And where lands were devised to trustees to the use that M. should receive during her life one yearly rentcharge of £2,200, to be charged upon and issuing out of the lands mentioned, to be paid half-yearly "without any deduction or abatement whatsoever, on account of any taxes, charges, or assessments already or to be thereafter taxed, charged, assessed, or imposed on the same hereditaments, or on the said rentcharge of £2,200, or on the said M. or her assignees in respect thereof, by authority of parliament, or otherwise howsoever," it was held that M. was entitled to receive the rentcharge in full, without any deduction in respect of income tax, *Festing* v. *Taylor*, 3 B. & S. 235; 32 L. J. Q. B. 41. See also *Re Bannerman's Estate*, 21 Ch. D. 105; 51 L. J. Ch. 449. Where there are no words to show that the annuity is given free of tax, the income tax must be borne by the annuitant, *Re Sharp*, [1906] 1 Ch. 793; 75 L. J. Ch. 458. Monthly payments may be an "annuity," *Re Cooper*, 62 S. J. 230. An annuitant's right to relief under the Income Tax Acts depends upon the proportion which the annuity bears to his total income, *Re Pettit*, [1922] 2 Ch. 765; 91 L. J. Ch. 732.

Time of beginning,

(*g*) Where the time of first payment is fixed by the will, the payment must of course be made as directed, if the executor is satisfied of the sufficiency of the estate to answer debts and legacies; but if no time of payment is fixed, an annuity begins from the day of the testator's death, and the first payment is to be made at the end of twelve months from that day, 2 Wms. Exors. 1116; *Houghton* v. *Franklin*, 1 S. & S. 392. But it seems doubtful whether this rule would hold in a case where the annuity is given out of a residue, *Storer* v. *Prestage*, 3 Mad. 168. And as to the distinction in this respect between an annuity and a legacy for life, see *Gibson* v. *Bott*, 7 Ves. 97.

and first payment of annuity.

To say that the first quarterly or half-yearly payment of an annuity shall be made at a given period does not necessarily imply that the

NOTES TO PREC. 9.

annuity is to begin from the beginning of the quarter or half-year ending at such day of payment. For instance, where a testator gave an annuity to A. for life, and directed the first payment to be made within one month from his (the testator's) death, the annuity was held to begin from the death of the testator; and though the first year's payment was to be made at the appointed time, the second annual payment did not become due until the end of the second year, *Irvin* v. *Ironmonger*, 2 R. & M. 531. It will be observed that, in this case, to have held the annuity to be payable continuously from the first payment, would have had the effect of giving it a beginning in the lifetime of the testator. See also *Williams* v. *Wilson*, 5 N. R. 267, as to apportionment of the first payment of an annuity directed to be paid on the usual quarter days, and note (*f*), Prec. 8.

(*h*) The Married Women's Property Act, 1882, would, of course, render the sisters' shares their separate property if these words were omitted. The insertion of these words may, however, in certain circumstances, have important consequences to the legatees.

Where a marriage settlement contains a provision for settlement of after-acquired property of the wife, excepting property which may be bequeathed to her for her separate use (which is a form of covenant for settlement of after-acquired property formerly common), property bequeathed to her, but not expressed to be for her separate use, will be bound by the covenant, whilst property bequeathed to her, and expressed to be for her separate use, will be exempt from such covenant. This curious result is brought about by sect. 19 of the Married Women's Property Act, 1882, which excepts settlements from the operation of the Act. The consequence is that if the words within brackets are omitted, the sisters' shares may possibly be bound by covenants contained in their marriage settlements to settle after-acquired property, which might not be the case if such words were inserted, *Re Whitaker*, 34 Ch. D. 227; 56 L. J. Ch. 251. And this result does not appear to be effected by sect. 2 of the Married Women's Property Act, 1907, unless the married woman was an infant at the time of the execution of the settlement.

No. X.

PREC. 10.

WILL *devising Real Estate to Trustees, Upon Trusts for raising Money by Mortgage in aid of the Personal Estate to pay Debts and Legacies; and, subject thereto, for the Testator's Son and his Issue in strict Settlement; and, failing such Issue, for raising certain sums; and, subject thereto, for collateral Relations.—Specific Bequest of Leaseholds for Years, and other Specific Legacies. — Bequest of Annuities and Pecuniary Legacies.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

PREC. 10.

Appointment of executors and trustees.

2. I APPOINT —— and —— executors and trustees of this my will and trustees thereof for the purposes of the Settled Land Act 1925.

Debts, &c., to be paid out of personalty.

3. I DIRECT that my debts and funeral and testamentary expenses and the annuities and pecuniary legacies hereinafter bequeathed shall be paid primarily out of my personal estate.

Devise of freeholds to trustees;

4. I DEVISE all the freehold manors messuages lands tenements and hereditaments to which I may be entitled at my death unto the said [*trustees*] in fee simple upon the trusts following (namely) UPON TRUST that in the first place my trustees shall with or out of the rents and profits of the said devised estates or by mortgaging (*a*) or charging the same or a competent part or parts thereof raise in aid of my personal estate (if insufficient) so much money as shall be requisite to satisfy my debts (*b*) and funeral and testamentary expenses and the annuities and pecuniary legacies hereinafter bequeathed together with the expenses of executing this trust and apply the money to be so raised accordingly And subject thereto hold the same IN TRUST for my son [*name*] during his life and as to the said freehold hereditaments without impeachment of waste (*c*) And immediately after his death IN TRUST for the sons of my said son successively according to seniority in tail [*or* in tail male] (*d*) And failing such issue IN TRUST without prejudice to the implied trust for sale for the daughters of my said son equally as tenants in common in tail with cross remainders between such daughters in tail as to both the original and the accruing shares And failing such issue UPON TRUST with or out of the rents and profits of the said devised estates or by mortgaging or charging the same or a competent part or parts thereof to raise and pay to the respective persons or classes of persons next hereinafter named or described if living at the time of the failure of the antecedent trusts the several sums of money which immediately follow their respective names or descriptions (that is to say) [*name, &c.*] £—— [*name, &c.*] £—— &c. The children of my sister [*name*] who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be married £—— apiece The children of &c. £—— apiece And subject thereto upon trust to sell the same and to stand possessed of the net proceeds thereof in trust as to one moiety thereof for my brother [*name*] And as to the other moiety thereof for my nephews (*e*) [*names*] equally as tenants in common.

—upon trust to raise money by mortgage, in aid of the personal estate, to pay debts, &c.;

—and subject thereto, in trust for testator's son and his issue, in strict settlement;

and, failing such issue,

—upon trust to raise and pay certain sums; and, subject thereto,

—in trust for collateral relations.

Bequest of leasehold house to wife for life, and

5. I BEQUEATH the messuage in which I now reside situate at —— and held by me under a lease dated &c. to my wife [*name*] for her life if my term therein shall so long endure and after her

death to my said son [*name*] for the then residue of such term.

then to son absolutely.

6. I BEQUEATH the several specific legacies following (namely) To my wife all the wines liquors fuel and other consumable household stores and provisions which shall belong to me at my death for her absolute use To A. and B. and the wife of B. equally my holding in Consols (*f*) To &c.

Bequest of specific legacies.

7. I BEQUEATH to the several persons next hereinafter named for their respective lives the several annuities which follow their respective names (that is to say) To my wife £—— a year in addition to the provision made for her by the settlement on our marriage To each of my sisters [*names*] £—— a year (*g*) To &c. AND I DIRECT such annuities to be paid in equal portions on the four usual quarterly days of payment of rent and the first portion to be paid on such of the said days as shall occur next after my death but proportionate parts of the said annuities shall not be payable for the days elapsed at the deaths of the respective annuitants of the then current quarter (*h*) AND I DIRECT funds to be appropriated in the names of my trustees out of my personal estate but not by mortgaging or charging my real estate sufficient at the period of appropriation to answer by means of the income thereof the payment of the same annuities which funds on the dropping of the respective annuities shall follow the destination of the residue of my personal estate.

Bequest of annuities;

with direction to set apart funds.

8. I BEQUEATH to the several persons next hereinafter named the several legacies which follow their respective names (that is to say) To my niece [*name*] in addition to the provision made for her by the settlement executed by me on her marriage the sum of £—— To my niece [*name*] the sum of £—— in satisfaction of a legacy bequeathed to her by the will of —— and received by me To my nephew [*name*] the sum of £—— which legacy together with the sum of £—— advanced by me for his benefit makes up the sum of £—— which I originally promised to leave him AND I DIRECT the said pecuniary legacies to be paid at the end of —— calendar months next after my death.

Bequest of pecuniary legacies.

9. I BEQUEATH the residue of my personal estate unto my said son [*name*] for his absolute benefit.

Bequest of residue to son.

10. *Investment clause.* See note (*b*) to Prec. 4.

11. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 10.

Mode of mortgaging freeholds.

(*a*) As to the mode in which a mortgage of freeholds is to be effected after 1925, see sect. 85 of the Law of Property Act, 1925 (15 Geo. 5, c. 20).

Freehold estates of

(*b*) By 3 & 4 Will. 4, c. 104, the freehold and copyhold estates of persons dying on or since August 29, 1833, who had not by will charged

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their real estates with the payment of debts, were constituted assets to be administered in the Courts of Equity for the payment of debts, due as well on simple contract as on specialty; and by 32 & 33 Vict. c. 46, it was enacted that in the administration of the estate of any person dying after 1869, all creditors, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets, whether legal or equitable, but without prejudice to any security.

deceased persons subjected to their simple contract debts.

By the Land Transfer Act, 1897, s. 2, sub-s. (3), his real estate was to be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing therein contained should alter or affect the order in which real and personal assets respectively were then applicable in or towards the payments of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

After 1925 the Administration of Estates Act, 1925 (15 Geo. 5, c. 23) will apply, which provides—

Real and personal estate of of deceased are assets for payment of debts.

Sect. 32.—"(1) The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power (including the statutory power to dispose of entailed interests) disposes by his will, are assets for payment of his debts (whether by specialty or simple contract) and liabilities, and any disposition by will inconsistent with this enactment is void as against the creditors, and the Court shall, if necessary, administer the property for the purpose of the payment of the debts and liabilities. This subsection takes effect without prejudice to the rights of incumbrancers.

"(2) If any person to whom any such beneficial interest devolves or is given, or in whom any such interest vests, disposes thereof in good faith before an action is brought or process is sued out against him, he shall be personally liable for the value of the interest so disposed of by him, but that interest shall not be liable to be taken in execution in the action or under the process."

Administration of assets.

Sect. 34.—"(1) Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to this Act.

"(2) The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person.

"Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors.

"(3) Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act."

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The First Schedule to the Act provides—

"PART I.

"RULES AS TO PAYMENT OF DEBTS WHERE THE ESTATE IS INSOLVENT.

"1. The funeral, testamentary, and administrative expenses have priority.

"2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.

"PART II.

"ORDER OF APPLICATION OF ASSETS WHERE THE ESTATE IS SOLVENT.

"1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.

"2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.

"3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.

"4. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.

"5. The fund, if any, retained to meet pecuniary legacies.

"6. Property specifically devised or bequeathed, rateably according to value.

"7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value.

"8. The following provisions shall also apply—

"(a) The order of application may be varied by the will of the deceased.

"(b) This part of this Schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets."

But, though a testamentary provision for the payment of debts is not now dictated by the same imperative considerations as formerly, yet such provision is still useful, *Re Balls*, [1909] 1 Ch. 791; 78 L. J. Ch. 341.

The Wills Act makes no alteration in the law which made real estate assets for the payment of debts, *Eddels* v. *Johnson*, 1 Gif. 22; 27 L. J. Ch. 302.

As to the power for trustees after 1925, to raise money by sale or mortgage, see sects. 16, 17, and 18 of the Trustee Act, 1925 (15 Geo. 5, c. 19); sect. 28 of the Law of Property Act, 1925, and sect. 39 of the Administration of Estates Act, 1925.

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A devise of real estate in trust for the payment of debts does not revive a debt which at the time of the testator's death has been barred by the Statute of Limitations, *Burke* v. *Jones*, 2 V. & B. 275. A direction to pay a specific debt may, however, operate for the benefit of a creditor whose debt is barred at the testator's death, *Williamson* v. *Naylor*, 3 Y. & C. Ex. 208.

Effect of a devise upon trust to pay debts;

—of a bequest of personalty.

But in respect of debts not barred at the testator's death, a bequest of personalty for the payment of debts does not prevent the operation of the statute, *Scott* v. *Jones*, 4 C. & F. 382; 9 L. J. (N.S.) Ch. 252; *Freake* v. *Cranefeldt*, 3 M. & C. 499; 8 L. J. (N.S.) Ch. 61; *Evans* v. *Tweedy*, 1 Be. 55; 8 L. J. (N.S.) Ch. 46. But a trust or charge for payment of debts generally out of real estate is available for twelve years, 37 & 38 Vict. c. 57, ss. 8, 10; *Re Stephens*, 43 Ch. D. 39; 39 L. J. Ch. 109. As to a trust to pay out of a mixed fund, see *Re Raggi*, [1913] 2 Ch. 206; 82 L. J. Ch. 396.

(*c*) See note (*bb*) to Prec. 9, *ante*, p. 172.

What may be the subject of an entail.

(*d*) All property, real or personal, may, since 1925, be the subject of entail. See as to the creation of entailed interests, sect. 130 of the Law of Property Act, 1925.

Gifts to relatives:

(*e*) As to a gift to tenants in common, see note (*c*) to Prec. 9. A gift in a will to a class of persons described by relationship will, in the absence of an overruling context, be construed as a gift to all persons answering the relationship, whether of the whole blood or of the half-blood. Therefore a bequest simply to the sisters of A. will extend to

half-blood,

A.'s sisters of the half-blood, *Re Reed*, 57 L. J. Ch. 790; and the description of nephews and nieces will include children of a half-blood brother or sister, *Grieves* v. *Rawley*, 10 Ha. 63; 22 L. J. Ch. 625. But

"children,"

see *Re Dowson*, [1909] W. N. 245. If a testator gives a legacy to the "children" of a deceased person, mentioning that person as dead, and at the date of the will there are no children of that person, but there are grandchildren, the gift may take effect in favour of the grandchildren, *Berry* v. *Berry*, 3 Gif. 134; *Fenn* v. *Death*, 23 Be. 73. But if the testator mentions the "children" of several persons, of whom some have left children, and one has left grandchildren only, the word children having been only once used cannot have two meanings attributed to it, *Radcliffe* v. *Buckley*, 10 Ves. 195; with which compare, *Re Kirk*, 52 L. T. 346; *Re Smith*, 35 Ch. D. 558; 56 L. J. Ch. 771. But the question is one of construction of the particular will, *Re Atkinson*, [1918] 2 Ch. 138; 87 L. J. Ch. 505, where the cases were discussed. If the testator shows an intention to use the word "children" in its normal and ordinary meaning, by himself having mentioned grandchildren as well as children, the word children will receive its ordinary meaning. See Jarman, Wills, p. 1656. And "issue" may, by reference to their parent, be restricted to mean children, *Sibley* v. *Perry*, 7 Ves. 522; followed in *Re Timson*, [1916] 2 Ch. 362; 85 L. J. Ch. 561; distinguished in *Re Swain*, [1918] 1 Ch. 399, 574; 87 L. J. Ch. 305; *Re Burnham*,

"nieces,"

[1918] 2 Ch. 196. A gift to "nieces" means nieces in the first degree, *Crook* v. *Whitley*, 7 D. M. & G. 490; 26 L. J. Ch. 350, and a gift to the "present nieces of A." is identical with "the nieces of A." (*ib.*);

"nephews and nieces,"

"nephews and nieces" will not include grandnephews and grandnieces if there are proper nephews and nieces to answer the description, *Thompson* v. *Robinson*, 27 Be. 486; 29 L. J. Ch. 280; *Williamson* v. *Moore*, 10 W. R. 536; *Re Blower's Trusts*, L. R. 6 Ch. 351; 42 L. J. Ch. 24; *Re Fish*, [1894] 2 Ch. 83; 63 L. J. Ch. 437. Where a widow bequeathed

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to her nephews and nieces simply, it was held that this did not include the nephews and nieces of her husband, *Smith* v. *Lidiard*, 3 K. & J. 252; *Re Green*, [1914] 1 Ch. 134; 83 L. J. Ch. 248; and though a testatrix gave a specific legacy to a niece of her husband as "my niece A. B.," and gave her residue to "all my nephews and nieces," the nephews and nieces by blood of the testatrix took the residue to the exclusion of A. B., *Wells* v. *Wells*, L. R. 18 Eq. 504; 43 L. J. Ch. 681; *Merrill* v. *Morton*, 17 Ch. D. 382; 50 L. J. Ch. 249; *Re Cozens*, [1903] 1 Ch. 138; 72 L. J. Ch. 39; *Re Winn*, [1916] W. N. 366; but if the testatrix had had no nephew or niece, the nephews and nieces of the husband would have taken, *Hogg* v. *Cook*, 32 Be. 641; *Sherratt* v. *Mountford*, L. R. 8 Ch. 928; 42 L. J. Ch. 688; *Re Fish*, [1894] 2 Ch. 83; 63 L. J. Ch. 437, and where a married man bequeathed to his nephews and nieces "on both sides," the gift was held to extend to the nephews and nieces of his wife, *Frogley* v. *Phillips*, 3 D. F. & J. 466. The word "cousins" used *simpliciter* is held to mean first cousins, *Caldecott* v. *Harrison*, 9 Sim. 457; 9 L. J. (N.S.) Ch. 331; *Stoddart* v. *Nelson*, 6 D. M. & G. 68; 25 L. J. Ch. 116; *Stevenson* v. *Abingdon*, 31 Be. 305; *Burbey* v. *Burbey*, 9 Jur. (N.S.) 96. In *Re Taylor*, 34 Ch. D. 255; 56 L. J. Ch. 171, "cousin" was construed to mean the wife of a cousin. In *Mayott* v. *Mayott*, 2 Bro. C. C. 125, a gift to "first and second cousins," where there were no second cousins either at the date of the will or at the death of the testator, was held to mean first cousins and first cousins once removed. See also *Slade* v. *Fooks*, 9 Sim. 386; 8 L. J. Ch. 41; *Re Bonner*, 19 Ch. D. 201; 51 L. J. Ch. 83; *Wilks* v. *Bannister*, 30 Ch. D. 512; 54 L. J. Ch. 1139. In *Silcox* v. *Bell*, 1 S. & S. 301; 1 L. J. (O.S.) Ch. 137, first cousins twice removed were held entitled under a gift to relations who could prove themselves to be either "first or second cousins or their representatives"; and this was followed in *Charge* v. *Goodyer*, 3 Russ. 140; but both these cases were disapproved by Jessel, M.R., in *Re Parker*, 15 Ch. D. 528, aff. 17 Ch. D. 262; 50 L. J. Ch. 639. Under a bequest to "first cousins or cousins german" the children of first cousins did not take, the "cousins german" being considered as explanatory of, or merely synonymous with the "first cousins," *Sanderson* v. *Bayley*, 4 M. & C. 56; 8 L. J. (N.S.) Ch. 18. In *Corporation of Bridgnorth* v. *Collins*, 15 Sim. 541, it was held that under a gift to "second cousins" those only who had either the same great-grandfather or great-grandmother were second cousins. In *Re Parker*, 17 Ch. D. 262; 50 L. J. Ch. 639; children or grandchildren of first cousins were excluded from a gift to "second cousins," where there existed second cousins capable of taking the gift. It appears from these cases that although the construction of the words has not been uniform, the tendency of later decisions has been to give them their strict meaning unless there be no person answering to the strict description. As to the meaning of "half-cousins," see *Re Chester*, [1914] 2 Ch. 580; 84 L. J. Ch. 78.

"cousins,"

That "family" is a flexible term, see *Blackwell* v. *Bull*, 1 Ke. 176; 5 L. J. (N.S.) Ch. 251. It may, in a devise of freehold estates, mean the heir-at-law, *Lucas* v. *Goldsmid*, 29 Be. 657; 30 L. J. Ch. 935; though that is not its natural meaning; it may mean the next of kin, and either living at the testator's death, or at the death of some other person, *Green* v. *Marsden*, 1 Drew, 646; 22 L. J. Ch. 1092. The primary meaning of the word in a will as regards personal estate is "children," *Re Terry's Will*, 19 Be. 580; *Pigg* v. *Clarke*, 3 Ch. D. 672; 45 L. J. Ch. 849; and it may have this meaning in a devise of real estate, *Burt* v. *Hellyar*,

"family,"

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L. R. 14 Eq. 160; 41 L. J. Ch. 430; *Re M'Cann*, [1916] 1 Ir. R. 255. Where there is an immediate absolute legacy for the benefit of "A.'s family," the children of A., and those only, to the exclusion of A. himself, are entitled, *Barnes* v. *Patch*, 8 Ves. 604; a legacy by a married man to his family is a gift to his children, to the exclusion of his wife, *Re Hutchinson and Tenant*, 8 Ch. D. 540; and where a legacy is given to trustees for a married woman and her family, the married woman and her children are entitled, to the exclusion of her husband, *M'Leroth* v. *Bacon*, 5 Ves. 166. A bequest to "A. and his family" will create a joint tenancy between A. and his children living at the testator's death, *Re Parkinson's Trust*, 1 Sim. (N.S.) 242; 20 L. J. Ch. 224. The context of the will must in each case determine the intended recipients under this general term, see *Re Sadler*, [1915] W. N. 348. And see *Re Keighley*, [1919] 2 Ch. 388, where the words "my people" were construed.

"relations." Under a devise or bequest to "relations" the next of kin according to the Statute of Distributions will be entitled, see 1 Rop. Leg. 100-119; *Rayner* v. *Mowbray*, 3 Bro. C. 234; *Doe* v. *Over*, 1 Tau. 263; *Re Swan*, [1911] 1 Ir. R. 405; *Lees* v. *Massey*, 3 D. F. & J. 113; *Eagles* v. *Le Breton*, L. R. 15 Eq. 148; 42 L. J. Ch. 362. A power to appoint to relations is not confined to relatives within the statutes, *Harding* v. *Glyn*, 1 Atk. 469; *secus*, as to a power to *distribute* a fund among relations, *Finch* v. *Hollingsworth*, 21 Be. 112; 25 L. J. Ch. 55; *Salusbury* v. *Denton*, 3 K. & J. 529; 26 L. J. Ch. 851; *Re Caplin's Will*, 2 Dr. & S. 527; 34 L. J. Ch. 578. In *Snow* v. *Teed*, L. R. 9 Eq. 622; 39 L. J. Ch. 420, a power to a spinster to appoint a fund amongst "her own family or next of kin" was held not to be confined to statutory next of kin, but to include any relation.

Where in a will a word descriptive of persons has a clear and definite meaning when used in one part, but has not when used in another, there is a presumption that the word is intended to bear the same meaning in the latter case as in the former, *Re Birks*, [1900] 1 Ch. 417; 69 L. J. Ch. 124.

(*f*) A devise or bequest to a man and his wife and to a third person is, in wills coming into operation before 1926, construed as a gift of a moiety to the husband and wife, and of the other moiety to the third person, this rule having been founded on the doctrine that husband and wife were, for most purposes, one person. But any indication, however slight, of an intention that each shall take separately has been held to defeat the application of the rule, *Bricker* v. *Whatley*, 1 Vern. 233; *Warrington* v. *Warrington*, 2 Hare, 54; *Re Wylde*, 2 D. M. & G. 724; 22 L. J. Ch. 87; *Dias* v. *De Livera*, 5 App. Cas. 123; 49 L. J. P. C. 26; *Re March*, 27 Ch. D. 166; 54 L. J. Ch. 143; Kay. J., held, in *Re Jupp*, 39 Ch. D. 148; 57 L. J. Ch. 774, that the rule was not altered by the Married Women's Property Act, 1882, in the case of wills made since the Act came into operation; as between the husband and the wife, however, the Act operates to give the wife one half of the share taken by the husband and wife as her separate property, the other half going to the husband. See the comments by North, J., upon *Re Jupp*, in *Re Dixon*, 42 Ch. D. 306, followed in *Re Jeffery*, [1914] 1 Ch. 375; 83 L. J. Ch. 251, where, upon construction, *Re Jupp* was not followed. In the case of wills coming into operation after the year 1925, the husband and wife will be treated as two persons under sect. 37 of the Law of Property Act, 1925.

(*g*) See note (*f*), Prec. 9. (*h*) See note (*f*), Prec. 8.

No. XI.

WILL *of a* BACHELOR, *disposing of Real Estate in favour of collateral Relations.—Specific and Pecuniary Legacies and Life Annuities.—Various Trusts declared of several of the Pecuniary Legacies and Annuities, in favour of Nephews and Nieces and other collateral Relations.—Trust for an Imbecile.—Residue divided among Testator's Brothers and Sisters, and settled on them and their Families; with cross Limitations between the Stocks: and with ultimate Limitations to the Brothers, and to the Appointees and Next of Kin of the Sisters, of their respective original Shares.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT [*names &c.*] to be executors and trustees of this my will and trustees thereof for the purposes of the Settled Land Act 1925.

Appointment of executors and trustees.

3. I DEVISE the freehold messuage lands and hereditaments at —— in the county of —— which I lately purchased from [*name*] to my brother [*name*] in fee simple.

Devise in fee.

4. I DEVISE my freehold farm called —— in the parish of —— in the county of —— which descended to me as heir-at-law of my uncle [*name*] unto my brother [*name*] for his life without impeachment of waste and on his death to his son my nephew [*name*] in fee simple.

Devise for life; —remainder in fee.

5. I DEVISE all my freehold hereditaments in the county of —— unto my brother [*name*] for his life without impeachment of waste And on his decease to his wife [*name*] for her life without impeachment of waste And on her death to their four children [*names*] as joint tenants on trust to sell the same and to hold the net proceeds of such sale in trust for the said four children equally as tenants in common in tail with cross-remainders (*a*) between them in tail With remainder to my nephew [*name*] absolutely.

Devise for life; —remainder for life; —remainder to several in common in tail, with cross-remainders;

6. I DEVISE my freehold dwelling-house at —— in the parish of —— now in the occupation of my sister [*name*] to my said sister [*name*] until she shall die or cease to occupy the same as her residence (*b*) and keep the same in tenantable repair and insured in the sum of £—— at least against loss by fire And on the determination of her estate to such of her daughters [*names*] in joint tenancy as being spinsters or a spinster shall occupy the same as their or her usual residence and shall keep the same in

Devise to one for personal residence; —remainder to several, being spinsters, for personal residence:

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tenantable repair and insured as aforesaid so long as they or she shall so occupy and keep the same And on the determination of their or her estate upon trust for such persons for such estates and in such manner as my last-mentioned sister shall by any deed or deeds or by her last will or codicil appoint And in default of appointment in trust for her son [*name*] in tail And on failure of his issue upon trust to sell the same and divide the net proceeds of sale amongst her daughters equally (*c*) as tenants in common.

—remainder in tail; —remainder on trust for sale and division.

Devise for several in common, with cross-limitations, and a limitation over in thirds.

7. I DEVISE my freehold hereditaments at —— in the county of —— now in the occupation of [*name*] as tenant from year to year to my trustees hereinbefore named upon trust that my trustees shall sell the same and divide the net proceeds of sale amongst such of my nephews (*d*) [*names*] as shall attain twenty-one years or die under that age leaving issue and if all shall die under that age without leaving issue then to hold such proceeds in trust as to one-third part for my cousin [*name*] and as to the two remaining third parts thereof for my cousins [*names*] in equal shares as tenants in common.

Devise for several in common for life; and —as survivor shall appoint;

8. I DEVISE my freehold hereditaments at —— in the county of —— now in the occupation of [*name*] as tenant under a lease granted to him by me to my trustees hereinbefore named upon trust that my trustees shall sell the same and invest the net proceeds of sale and stand possessed of such investments in trust to pay the income thereof to my nieces [*names*] and the survivors and survivor of them during their respective lives if more than one in equal shares as tenants in common And on the death of the survivor of them in trust as to the capital and future income thereof for such persons for such interests and in such manner as such survivor either before or after her survivorship shall be ascertained shall by her will or codicil appoint And in default of such appointment UPON TRUST for such of the children of my last-mentioned nieces living at the death of the survivor of them and such of the issue then (*e*) living of their children then dead as either before or after the decease of such survivor shall being males or a male attain the age of twenty-one years or being females or a female attain that age or be married to take if more than one as tenants in common in a course of distribution according to the stocks and not to the number of the individuals the issue of a deceased child taking by substitution as tenants in common the share only which their parent would have taken had such parent lived and attained a vested interest And if there shall not be any such child or issue then to dispose of the same as part of the residue of my personal estate hereinafter bequeathed.

—remainder for children and issue living at death of survivor, *per stirpes*;

—if none, to add the same to residue of personal estate.

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Devise for several in common for life;

—for the children and issue of tenant for life, *per stirpes*;

—remainder as tenant for life shall appoint, with accruer between the tenants for life and their issue.

9. I DEVISE all my other freehold hereditaments in the said county of —— to my trustees hereinbefore named upon trust that my trustees shall sell the same and invest the net proceeds of sale and stand possessed of such investments in trust for my four nieces [*names*] in equal shares for their respective lives And on the death of each niece as to her share in trust for the children of the same niece living at her death and the issue then living of her children then dead to take if more than one as tenants in common according to the stocks and not to the number of the individuals the issue of a deceased child taking by substitution as tenants in common the share only which their parent would if living have taken And if there shall not be any such child or issue Then in trust for such person for such interest and in such manner as my same niece shall by will or codicil appoint And in default of such appointment for the others of my same nieces respectively in equal shares for the same interests and with the same subsequent trust (including the trust in default of appointment) as are herein expressed concerning their respective original shares And as to the entirety of the same investments on failure of all the trusts hereinbefore expressed in trust for my said brothers [*names*] as joint tenants.

Devise to provide rentcharge payable weekly;

—of land, so charged, in trust for sale and proceeds for husband and wife jointly;

—charge to cease on alienation.

10. I DEVISE my close called —— situate at —— to the said [*trustees*] upon trust that out of the rents and profits thereof my nephew [*name*] may receive during his life but subject to the proviso hereinafter contained an annuity or yearly sum of £—— by weekly payments of £—— each on Saturday in every week the first of such payments to be made on the first Saturday after my death (*f*) And subject to the said annuity upon trust to sell the same and to stand possessed of the net proceeds of sale in trust for my brother-in-law [*name*] and my sister [*name*] his wife as joint tenants PROVIDED that if by reason of the act or default of the said [*annuitant*] or by operation of law the said annuity of £—— or any part thereof shall be aliened charged or disposed of to or in favour of any other person or persons or a corporation so that the said [*annuitant*] would be deprived of the personal enjoyment thereof or of any part thereof then the same annuity shall thenceforth be paid to my said brother-in-law [*name*] and [*name*] his wife.

Bequest of leaseholds to one absolutely.

11. I BEQUEATH my leasehold tenements at —— in the county of —— which I now hold under a lease from [*name*] to my brother [*name*] for such term as I may have therein at my death subject to the payment of the rent and performance of the covenants under which the same tenements may be held.

Bequest of leaseholds to one for life,

12. I BEQUEATH my leasehold tenements at —— in the county of —— which I now hold under a lease from [*name*] upon

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remainder absolutely.

trust for my brother [*name*] for his life if such term as I may have therein at my death shall so long endure he paying the rent and performing the covenants under which the same tenements may be held And on his decease if such term shall be then unexpired for my nephew [*name*] for the then residue of the same term subject to the payment of the same rent and performance of the same covenants.

Residuary devise and bequest of freeholds and leaseholds, to one absolutely, charged with a sum in augmentation of the residue of the personal estate.

13. I DEVISE AND BEQUEATH the residue of the freehold hereditaments and leasehold tenements which shall belong to me at my death to my said brother [*name*] as to the freehold hereditaments in fee simple and as to the leasehold tenements for such terms as I may have therein respectively at my death subject to the payment of the rents and performance of the covenants under which the same may be respectively held but charged as to both the freehold and leasehold premises with the payment to my executors or administrators at the end of three calendar months from my decease of the sum of £—— to be disposed of as part of the residue of my personal estate hereinafter bequeathed.

Bequest of rents due.

14. I BEQUEATH to the person or persons who under the provisions of this my will shall at my death respectively become entitled to possession of the freehold hereditaments and leasehold premises hereinbefore disposed of all rents and profits then due or accruing due in respect thereof subject to payment thereout of all rates taxes outgoings and expenses then due owing or accruing due in respect thereof or ordinarily chargeable against the same hereditaments and premises respectively.

Bequest of specific legacies.

15. I BEQUEATH the specific legacies following namely To my brother [*name*] my gold watch with the chain and seals requesting but not imposing an obligation or creating a trust that he will leave them at his death to my nephew [*name*] (*g*). To my nephew [*name*] all the printed books and manuscripts which shall belong to my library at my decease To my old friend [*name*] my diamond ring as a mark of my esteem To [*name*] my gold snuff-box in testimony of my grateful remembrance of his many professional and friendly services To &c.

Bequest of pecuniary legacies;

—to one, or on death, in testator's lifetime, to his executors or administrators;

—to classes of persons,

16. I BEQUEATH the legacies following namely To my nephew [*name*] or if he shall die in my lifetime [*or where it is doubtful whether the legatee be living or not*, or if he is now dead or shall die in my lifetime] then to his executors or administrators (*h*) to be disposed of as part of his personal estate £—— To such of my nephews and nieces [*names*] as shall be living at my death and if more than one equally £—— To each of the children of my deceased nephew [*name*] who either before or after my death shall attain the age of twenty-one years or marry £——

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with power for my executors or administrators to apply the whole or part of the legacy of each child while such legacy shall be contingent for the advancement in life or otherwise for the benefit of the same child during minority (*i*). To each of my nephews and nieces [*names*] the children of my said brother [*name*] by his late wife [*name*] the sum of £—— to be vested in and payable to each nephew as and when he shall attain the age of twenty-one years and to be vested in and payable to each niece as and when she shall attain that age or be married AND I DIRECT each of the legacies in this clause of this my will bequeathed to be if vested and payable paid or if not retained and set apart at the end of three calendar months next after my death but without interest in the meantime (*k*) and if retained and set apart to be invested in the names of my trustees in any of the modes of investment hereinafter authorised with power to vary the investment from time to time for any other or others of the like nature and the yearly produce thereof to be paid into the hands of my said brother [*name*] during the minority of the nephew or the minority and discoverture of the niece to whom the same shall belong in order that such yearly produce may be applied by my said brother at his discretion for the benefit of such nephew or niece and without his being obliged to render any account of the application thereof AND I DECLARE that if any of my said nephews shall die under the age of twenty-one years or any of my said nieces shall die under that age without having been married then the legacy of each of them so dying and the unapplied yearly produce and accumulations thereof if any shall sink into the residue of my personal estate.

with power to advance minors.

Legacy to each of several infant nephews and nieces, with a direction to pay the income to the father for maintenance, without account, and after his death to apply it;

17. I BEQUEATH to my trustees three sums of £500, £1,000 and £2,000 upon the trusts hereinafter declared thereof respectively To each of my executors £—— as an acknowledgment for the trouble of executing my will To the said [*one of the executors*] individually and without reference to his office (*l*) £—— To each of my friends [*names*] £—— To my servant [*name*] if he shall be in my service till my death and not be under notice to leave whether given or received in addition to any moneys then due from me to him £—— To each of the domestic servants who shall be in my service at my death and not be under notice to leave whether given or received except the said [*name*] a sum equal to one year's wages (*m*) in addition to any moneys then due from me to him or her also a suit of mourning to be provided by my executors at their discretion.

—to trustees, of several sums of money upon trusts after declared;

—to executors, for their trouble;

—to individual executor;

—to friends;

—to servants.

18. I DIRECT the legacies of such of the pecuniary legatees as at the time of the actual payment thereof respectively shall

Legacies to married women to be

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their separate property.

be married women to be paid into their respective proper hands in order that the same may be enjoyed and disposed of as their separate property (*n*).

Bequest of stock legacies.

19. I BEQUEATH the legacies of stock following (namely) To my said trustees £3,000 Two and a half per Cent. Consolidated Stock also £4,000 Two Pounds Fifteen Shillings per Cent. Annuities also £5,000 Two Pounds Ten Shillings per Cent. Annuities also £6,000 Three per Cent. Metropolitan Consolidated Stock upon the trusts hereinafter declared thereof respectively Also to my nephew [*name*] £1,000 Bank Stock.

Time fixed for delivery of legacies.

20. I DIRECT my executors to deliver the specific legacies aforesaid within one calendar month after my death and to pay or set apart the money (*o*) and stock legacies aforesaid within six calendar months after my death or sooner if they shall think fit and to pay the costs and expenses incurred in remitting the specific legacies hereby bequeathed out of my residuary estate (*p*).

Trusts of a pecuniary legacy—to invest and accumulate till a nephew attains twenty-one, then to transfer the fund to him.

21. I DIRECT my trustees to stand possessed of the said legacy of £500 money UPON TRUST to invest the same in their names and to accumulate the yearly income by similar investments until my nephew [*name*] shall attain the age of twenty-one years or die under that age and if he shall attain that age thereupon to transfer to him both the original fund and the accumulations but if he shall die under that age then to dispose thereof as part of the residue of my personal estate.

Trusts of another pecuniary legacy for a reputed son—if he dies under twenty-one without leaving issue, to sink into residue.

22. I DIRECT my trustees to stand possessed of the said legacy of £1,000 money IN TRUST for my reputed son [*name*] (*q*) but if he shall die under the age of twenty-one years without leaving issue the same legacy shall sink into the residue of my personal estate AND I DIRECT my trustees to invest the same legacy in their names.

Trusts of another pecuniary legacy, —for a cousin for life—for his children.

23. I DIRECT my trustees to stand possessed of the said legacy of £2,000 money UPON TRUST with the consent in writing of my cousin [*name*] and after his death in the discretion of my trustees to invest the same legacy in their names AND to permit the said [*cousin*] during his life to receive the annual income of the same legacy or the investment thereof and after his death as to as well the capital of the same legacy or investment as the annual income thereof thenceforth to accrue due IN TRUST for the child if only one or all the children if more than one of the said [*cousin*] who either before or after his death shall attain the age of twenty-one years or marry and if more than one equally And if no child of the said [*cousin*] shall attain the age of twenty-one years or marry then (subject

to the powers aforesaid) the same legacy with the accumulations shall sink into the residue of my personal estate.

Trusts of a stock legacy, —for a niece at twenty-one, or marriage with consent—interim dividends to be applied for her maintenance.

24. I DIRECT my trustees to stand possessed of the said legacy of £3,000 Two and a half per Cent. Consolidated Stock IN TRUST for my niece [*name*] if she shall attain the age of twenty-one years or be married with the previous consent in writing of her guardian or guardians but if she shall die under that age without having been married with such consent as aforesaid the same legacy shall sink into the residue of my personal estate AND I DIRECT my trustees to apply the dividends of the same legacy during the minority and discoverture of my said niece for her maintenance and education or at their option to pay the same to her guardian or guardians to be so applied but for whose due application thereof my trustees shall not be responsible.

Trusts of a stock legacy on protective trusts for nephew and then as part of residue.

25. I DIRECT my trustees to hold the income of the said legacy of £4,000 Two Pounds Fifteen Shillings per Cent. Annuities on protective trusts as declared by section 33 of the Trustee Act 1925 for the benefit (*r*) of my nephew [*name*] for the period of his life AND I DECLARE that the capital and so much of the income and accumulations as shall remain in the hands of my trustees at the death of my said nephew shall fall into the residue of my personal estate.

Trusts of another stock legacy—for the children of a sister, postponing the distribution in order to let in all the children —maintenance and advancement.

26. I DIRECT my trustees to stand possessed of the said legacy of £5,000 Two Pounds Ten Shillings per cent. Annuities IN TRUST for the children of my sister [*name*] who either before or after her death shall attain the age of twenty-one years or marry in equal shares but the distribution of the capital to be postponed till my said sister shall die or attain the age of [*fifty*] years [*or* till my said sister shall die *or* till she shall have attained the age of [*fifty*] years and my trustees shall in writing under their hands declare that there has in their opinion ceased to be any probability (*s*) of the birth of a future child or children of my said sister] in order that no child attaining the said age or marrying may in the ordinary course of nature be excluded (*t*) and I DIRECT my trustees to apply the income of the contingent share of each child whether liable to reduction by an increase in the number of objects or not for his or her maintenance and education or at the option of my trustees to pay the same income to my said sister to be so applied by her but without liability to account AND I DIRECT the income of the share of each child whose share shall be vested or of so much thereof as shall not be applied as last aforesaid to be paid to such child during the postponement of the distribution.

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Trusts of stock standing in testator's name for four nieces and their children, with cross-limitations, and a direction to settle the income to their separate use.

27. I DIRECT my trustees to stand possessed of the said legacy of £6,000 Three per Cent. Metropolitan Consolidated Stock UPON TRUST to divide the same into four equal shares and to settle the yearly produce of one of such shares on each of my four nieces [*names*] in such manner as the counsel of my trustees shall advise and approve as most effectual for securing to her the personal receipt and enjoyment thereof during her life inalienably (the cost of such settlement to be defrayed out of the said yearly produce) and after her death as to her share and the yearly produce thenceforth to accrue due for the same IN TRUST for her children equally or her child (as the case may be) who either before or after her death shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married And if any of my four last-mentioned nieces shall not have any child who shall being a son attain the age of twenty-one years or being a daughter attain that age or be married then as to as well the share or shares originally limited to the niece or nieces not having any such child as last aforesaid as the share or shares limited to such niece or nieces by this cross executory limitation IN TRUST for the others in equal shares or the other of my said four nieces for their or her respective lives or life and after their or her respective deaths or death for their or her respective children or child in manner hereinbefore expressed respecting her or their original share or respective shares And if none of my said four nieces shall have any child who shall being a son attain the age of twenty-one years or being a daughter attain that age or be married then the whole fund shall sink into the residue of my personal estate.

Direction to purchase a Government annuity to be applied at the discretion of trustees, as a personal provision for an imbecile.

28. I DIRECT the sum of £—— to be invested within three calendar months after my death in the purchase in the names of my trustees of an annuity from the Government Commissioners to be payable during the life of my nephew [*name*] and to be held by my trustees UPON TRUST in their discretion and of their uncontrolled authority to manage and administer the said annuity and to pay and apply the whole or such portion only of the said annuity as they shall think expedient to or for the clothing board lodging maintenance and support or otherwise for the personal and peculiar benefit of my said nephew during his life whether infant or adult and whether competent or incompetent to give an acquittance or discharge at such time or times in such portions and in such manner in all respects as my trustees shall think most conducive to his comfort and convenience AND I DECLARE that if my said nephew shall die before the investment of the said sum by my trustees in the

purchase of an annuity as aforesaid or if at his death any portion of the annuity shall remain in the hands of my trustees unapplied to the purposes of the trust last aforesaid then the uninvested or unapplied money shall sink into the residue of my personal estate.

Bequest of annuities; —to one for life; —to two and the survivor; —to one for two joint-lives; —to trustees, for life of a nephew, in trust for him till alienation, &c., and then for his wife and children,

29. I BEQUEATH the annuities following (*u*) namely To [*name*] an annuity of £—— for his life To [*name*] and [*name*] his wife and the survivor of them for their lives and the life of the survivor an annuity of £—— To [*name*] an annuity of £—— for the joint lives of himself and his father [*name*] To my trustees an annuity of £—— for the life of my nephew [*name*] UPON TRUST to pay the same annuity to my last-mentioned nephew until he shall do commit or permit some act or default whether voluntary or involuntary which if the trust for payment to him of the same annuity were to continue would be inconsistent with his personal enjoyment of the whole benefit of such trust and thenceforth to apply the same annuity for the maintenance or otherwise for the benefit of his wife and children for the time being or any of those objects in such manner as my trustees shall in their discretion think fit so long as there shall be any such objects in existence and after such act or default and failure of such objects as aforesaid the same annuity shall cease To my trustees an annuity of £—— for the life of [*name*] the wife of [*name*] IN TRUST for her but so that during her present coverture my trustees shall pay the same as the portions thereof shall accrue due and not by way of anticipation into her proper hands and for her separate use I DIRECT that the annuities aforesaid shall be paid in equal portions quarterly. AND I DIRECT my executors to appropriate or purchase in their names within six calendar months after my death investments of the nature hereinafter authorised sufficient at the period of appropriation to answer by means of the dividends thereof the payment of the said annuities respectively (which funds on the death of the respective annuitants shall fall into the residue of my personal estate) AND I DECLARE that if the income of such investments shall at any time prove insufficient for payment in full of any of the said annuities resort may be had to the capital thereof from time to time to make good such deficiency and that the surplus income if any after paying such annuities shall be applicable as income of my residuary estate and after such appropriation my residuary estate shall be released from the annuities hereby bequeathed.

—for the life of a married niece, for her separate use, inalienaby.

Direction as to payment of annuities; funds to be set apart for answering annuities.

Directions to executors to pay legacy duty.

30. I DIRECT my executors to pay the legacy duty and incidental expenses chargeable on the specific pecuniary and stock legacies and the annuities aforesaid so that the legatees and annuitants may receive the full amount thereof (*v*).

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Bequest of residue to trustees.

As to one-third—to invest—income to a brother for life—his wife for life—capital to their children.

As to another third—similar trusts (by reference) for another brother and his family.

As to one moiety of the remaining one-third—income to a sister for her separate use for life—to husband for life—capital to her children (by reference).

As to the other moiety of the same third—similar trusts (by reference) for another sister and her family.

Cross-limitations between the two sisters and

31. As TO the residue of my personal estate (including the said sum of £—— with which my residuary freehold and leasehold estates are hereinbefore charged) I BEQUEATH the same to my trustees upon the trusts following (namely) As to one equal third part of the said residue UPON TRUST with the consent in writing of my elder brother [*name*] and [*name*] his wife or the survivor of them and after the decease of such survivor in the discretion of my trustees to invest the same in the names of my trustees AND UPON FURTHER TRUST to empower the said [*elder brother*] during his life and after his death the said [*wife*] his wife during her life to receive the annual income of the same third part and after the death of the survivor of them as to as well the capital as the income thereof IN TRUST for the child if only one or all the children if more than one of the said [*elder brother*] who either before or after the determination of the previous trusts shall attain the age of twenty-one years or marry and if more than one equally AND as to one other third part of the said residue UPON SUCH TRUSTS and with such powers in favour of my younger brother [*name*] and [*name*] his wife and his child or children as shall correspond with the preceding trusts and powers in favour of the said [*elder brother*] and [*wife*] and his child or children AND as to one equal moiety of the remaining third part of the said residue UPON TRUST to permit my sister [*name*] the wife of [*name*] to enjoy the annual income thereof for her life but so that during her coverture my trustees shall pay such income as the same shall become due and not by way of anticipation into her proper hands and for her separate use And after her death UPON TRUST to pay the annual income thereof to her said husband for his life and subject to the trusts aforesaid as to as well the capital as the income thereof UPON SUCH TRUSTS and with such powers in favour of the child and children of my same sister as shall correspond with the trusts and powers hereinbefore declared in favour of the child and children of my said elder brother [*name*] AND as to the other equal moiety of the same third part UPON SUCH TRUSTS and with such powers in favour of my sister [*name*] the wife of [*name*] and her said husband and her child or children as shall correspond with the trusts and powers hereinbefore partly declared and partly referred to concerning the first-mentioned moiety of the same third part I DIRECT that each of my said sisters shall have power by will to appoint all or any part of the income of her said moiety to be paid to any aftertaken husband who shall survive her for his life I FURTHER DIRECT that on failure of the trusts of either moiety of the same third part such moiety shall be subject to the trusts and powers affecting the

other moiety I FURTHER DIRECT that on failure of the trusts of any of the said third parts the part or parts whereof the trusts shall so fail with all accretions thereto under this clause shall be added to the other or to the others equally [*or if the division be unequal*, rateably or apportionably according to the original division] of the said third parts and be subject to the trusts and powers hereinbefore declared or referred to concerning the part or respective parts to which the same shall attach AND I FURTHER DIRECT that on failure of all the trusts hereinbefore declared of the residue of my personal estate the share thereof originally limited in favour of each of my said brothers shall belong to him absolutely and the share thereof originally limited in favour of each of my said sisters shall be subject to her testamentary appointment and in default of such appointment be divisible on her death among the persons who would be entitled thereto under the Administration of Estates Act 1925 if she had died possessed thereof a spinster intestate and domiciled in England in manner provided by that Act.

their families; —between the brothers and sisters and their families.

Ultimate disposition of the residue —the shares of brothers to them absolutely— sisters to their testamentary appointees or next-of-kin.

32. I EMPOWER my trustees to exercise their judgment and discretion in regard to the conversion of such parts of the residue of my personal estate (including shares in joint stock companies) as shall not be of a perishable or determinable nature and I declare that the yearly proceeds of such parts thereof as they may accordingly permit to remain unconverted shall be deemed yearly income for the purposes of the trusts hereinbefore declared of such residue.

Discretion as to conversion.

33. *Investment clause.* See note (*b*) to Prec. 4.

34. I DECLARE that if any of the stocks [funds shares] or securities hereinbefore bequeathed shall by any means otherwise than by a sale by me be converted into money or into some other form of investment or security then the bequest thereof shall not be adeemed but the money or other investment or security which shall at the time of my death have been substituted therefor or shall in any other way represent the same shall be deemed to be included in the place thereof respectively (*x*).

Proviso against ademption.

35. I DECLARE that if both of my trustees herein named shall die in my lifetime or shall refuse to accept the trusts of my will it shall be lawful for my said brother [*name*] or his executors or administrators for the time being to appoint within six calendar months after my decease a fit person or fit persons to supply the vacancies occasioned by such deaths.

Power to appoint trustees— providing for death in testator's lifetime, and disclaimer.

36. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS, &c.

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NOTES to Precedent 11.

As to the mode of limiting cross-remainders.

(*a*) The expression "cross remainders" is well understood. See Challis R. P. 370 *et seq.* It is therefore better to limit cross-remainders in the simple form in the text than to attempt the more ample limitation which is generally inaccurate. It must be remembered that, after 1925, entailed interests may be created by way of trust in any property, real or personal, by expressions which in deeds before 1925 would have created a similar estate in freehold land. Law of Property Act, 1925, s. 130. See s. 34 of that Act as to undivided shares of land.

(*b*) See note (*h*), Prec. 28.

Tenancy in common.

(*c*) That the words "equally," "equally to be divided," "to be distributed in joint and equal proportions," "share and share alike," "respectively"; and to several "between" or "amongst" them, or to "each" of several persons, will create a tenancy in common in a will, see Jarm. Wills, 1790. As to a direction that younger children should "participate" with the eldest son, see *Liddard* v. *Liddard*, 28 Be. 266; 29 L. J. Ch. 619; as to the word "participate," see also *Robertson* v. *Fraser*, L. R. 6 Ch. 696; 40 L. J. Ch. 776. As to joint-tenancy and tenancy in common, see *Morley* v. *Bird*, 3 Ves. 629; and the notes on that case in Tud. L. C. R. P.; Jarm. Wills, ch. 44; *Morgan* v. *Britten*, L. R. 13 Eq. 28; 41 L. J. Ch. 70; *Att.-Gen.* v. *Fletcher*, L. R. 13 Eq. 128; 41 L. J. Ch. 167; and see *Welland* v. *Townsend*, [1910] 1 Ir. R. 177; and *Bennett* v. *Houldsworth*, 104 L. T. 304; and the Law of Property Act, 1925, sects. 34, 35, and 36. A direction that a share is to "be paid" to several persons does not prevent a joint-tenancy, *Re Clarkson*, [1915] 2 Ch. 216; 84 L. J. Ch. 881; *Re Schofield*, [1918] 2 Ch. 64; 87 L. J. Ch. 510. As to the effect of an advancement clause, see *Re Dunn*, [1916] 1 Ch. 97; 85 L. J. Ch. 168; and of a maintenance clause, *Re Ward*, [1920] 1 Ch. 334; 89 L. J. Ch. 181. As to the effect of gifts in undivided shares, see note (*c*) to Prec. 9.

Joint-tenancy.

(*d*) See note (*e*), Prec. 10.

Whether substituted issue are, like their parents, to outlive a period of distribution.

(*e*) Sometimes clauses, letting in the issue of children dying before a prescribed period, fail to express that the issue are to be substituted only in case they also outlive the period in question. A point of extreme nicety then arises, namely, whether the qualification expressly engrafted on the gift to the children is, by implication, to be extended to their issue. After great conflict of authorities, it has been decided that the substituted issue (in the absence of a contrary intention manifested by the context) are not required to outlive the period of distribution, *Martin* v. *Holgate*, L. R. 1 H. L. 175; 35 L. J. Ch. 789; *Re Woolley*, [1903] 2 Ch. 206; 72 L. J. Ch. 602; see also Jarm. Wills, ch. 36; Hawkins, Constr. Wills, 302. Where the gift to the issue is substitutional, no interest vests in issue who predecease their parent, *Crause* v. *Cooper*, 1 J. & H. 207; *Humfrey* v. *Humfrey*, 2 Dr. & S. 49; 31 L. J. Ch. 622; *Re Orton's Trusts*, L. R. 3 Eq. 375; 36 L. J. Ch. 279; *Hurry* v. *Hurry*, L. R. 10 Eq. 346; 39 L. J. Ch. 824; see also *Selby* v. *Whittaker*, 6 Ch. D. 239; 47 L. J. Ch. 121; *Re Ibbetson*, 88 L. T. 461; though if the gift is an original and not a substitutional one, it is not necessary that the issue survive their parent, *Re Smith's Trusts*, 7 Ch. D. 665; 47 L. J. Ch. 265; and see *Re Walker*, [1917] 1 Ch. 38; 86 L. J. Ch. 196. And notwithstanding that the children take as tenants in common, the substituted issue will, in the absence of words of severance repeated in the gift to the issue, or of words implying a severance, *Re Dunn*, [1916]

1 Ch. 97; 85 L. J. Ch. 168, take in joint-tenancy amongst themselves, *Coe* v. *Bigg*, 1 N. R. 536. See note (*f*), Prec. 18.

In a substitutional gift in a will "in the event of either of my grandchildren dying before becoming entitled to any share of my estate," it was held, upon the construction of the will, that "becoming entitled" meant becoming entitled in possession, not becoming entitled in interest, *Re Maunder*, [1903] 1 Ch. 451; 72 L. J. Ch. 367. And see *Re White*, 56 S. J. 109.

(*f*) Powers of distress for the recovery of rentcharges were supplied by the Conveyancing Act, 1881, s. 44, and the Conveyancing Act, 1911, s. 6 (2). Remedies for the recovery of rentcharges are now provided by sect. 121 of the Law of Property Act, 1925.

Precatory words, effect of, to create a trust.

(*g*) Words of request, entreaty, recommendation and desire, addressed to a devisee or legatee, respecting the destination of the property which is the subject of gift, may possess the force of an obligation. To prevent this consequence, which probably is seldom intended, and, still more, to prevent the litigation which such questions too often engender, it should always be distinctly shown that the devisee's discretion is not to be fettered by the injunction imposed upon his conscience, or, if the contrary is intended, a trust should be unequivocally created. Thus, such words as "will and desire," *Eeles* v. *England*, 2 Ver. 466; "request," *Eade* v. *Eade*, 5 Mad. 118; "wish and request," *Foley* v. *Parry*, 5 Sim. 138; "recommend," *Tibbits* v. *Tibbits*, 19 Ves. 656; "entreat," *Prevost* v. *Clarke*, 2 Mad. 458; "not doubting," *Parsons* v. *Baker*, 18 Ves. 476; "in the fullest confidence," *Wright* v. *Atkyns*, 17 Ves. 255; 19 Ves. 299, considered and explained in *Re Williams*, [1897] 2 Ch. 12; 66 L. J. Ch. 485; *Shovelton* v. *Shovelton*, 32 Be. 143; "authorize and empower," *Brown* v. *Higgs*, 4 Ves. 708; "well know," *Briggs* v. *Penny*, 3 M'N. & G. 546; and others of similar import, have been held to be imperative and to amount to a trust. See *Malim* v. *Keighley*, 2 Ves. J. 333, 531; not followed, *Re Hamilton*, [1895] 2 Ch. 370; 64 L. J. Ch. 799; *Reeves* v. *Baker*, 18 Be. 372; 23 L. J. Ch. 599; *Williams* v. *Williams*, 1 Sim. (N.S.) 358; 20 L. J. Ch. 280; *Bernard* v. *Minshull*, Joh. 276; 28 L. J. Ch. 549; *Knight* v. *Knight*, 3 Beav. 148; 9 L. J. (N.S.) Ch. 354; affirmed, 11 Cl. & F. 513; and *Irvine* v. *Sullivan*, L. R. 8 Eq. 673; 38 L. J. Ch. 635. But the latest decisions indicate a disposition in the judges of the present day not to carry the doctrine a step beyond the limits assigned to it by their predecessors; and in *Lambe* v. *Eames*, L. R. 6 Ch. 597; 40 L. J. Ch. 447, it was said that the "officious kindness of the Court of Chancery in interposing trusts" where none were intended had been "a very cruel kindness"; the Court has in fact seized hold of words explanatory of the testator's intention to make, or of his reason for making, an absolute gift, and has used them to cut down the absolute gift. It is not necessary, to exclude a legatee from a beneficial interest, that an effectual trust shall be created; it is only necessary that it clearly appears that a trust was intended. In *Curnick* v. *Tucker*, L. R. 17 Eq. 320, and *Le Marchant* v. *Le Marchant*, L. R. 18 Eq. 414, it was held that trusts were created; but in *Mackett* v. *Mackett*, L. R. 14 Eq. 49; 41 L. J. Ch. 704; *Re Bond*, 4 Ch. D. 238; 46 L. J. Ch. 488; *Stead* v. *Mellor*, 5 Ch. D. 225; 46 L. J. Ch. 880; *Re Hutchinson and Tenant*, 8 Ch. D. 540; *Parnall* v. *Parnall*, 9 Ch. D. 96; and *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321; 51 L. J. P. C. 72; *Re Falkiner*, [1924] 1 Ch. 88; 93 L. J. Ch. 76, that trusts were not created. The current of modern

The doctrine not now to be extended.

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authority has set strongly against holding particular expressions to impose precatory trusts. Recent authorities have established that in considering whether a precatory trust is constituted, the Court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed, *Re Adams and the Kensington Vestry*, 27 Ch. D. 394; 52 L. J. Ch. 758; *Re Diggles*, 39 Ch. D. 253; *Re Hamilton*, [1895] 2 Ch. 370; 64 L. J. Ch. 799; *Re Williams*, [1897] 2 Ch. 12; 66 L. J. Ch. 485; *Re Jones*, [1898] 1 Ch. 438; 67 L. J. Ch. 211; *Re Oldfield*, [1904] 1 Ch. 549; 73 L. J. Ch. 433. But see *Comiskey* v. *Bowring-Hanbury*, [1905] App. Cas. 84; 74 L. J. Ch. 263. Very little reliance can be placed upon the older authorities, many of which are only of value in so far as they may serve as warnings to the draftsman to avoid similar forms of expression. See also *Mexborough (Earl)* v. *Savile*, 88 L. T. 131; *Re Atkinson*, 103 L. T. 860; *Re Jevons*, 56 S. J. 72; *In b. Hanmer*, 80 L. J. P. 119. Where a testator left a farm to his wife, "she to have and manage same to the best advantage to herself and her five children" (named), it was held that she took as trustee for herself and the children as joint tenants, *Re Campbell*, [1918] 1 I. R. 429.

A testator after appointing his wife sole executrix and giving her a life interest in his property, continued as follows: "I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her." It was held that parol evidence was not admissible to explain the testator's wishes, and that, subject to the widow's life estate, there was an intestacy, *Re Hetley*, [1902] 2 Ch. 866; 71 L. J. Ch. 769.

Words indicative of the motive of a gift do not necessarily create a trust, *Re Hill*, [1923] 2 Ch. 259; 93 L. J. Ch. 13.

See further on the subject of implied trusts, and powers in the nature of a trust, Jarm. Wills, 24—ii. (2); and the notes to *Harding* v. *Glyn*, 1 Atk. 469, in 2 Tud. L. C. Eq.

Gift to "legal" or "personal representatives," or to "executors or administrators," how construed.

(*h*) The construction of gifts to "legal" or "personal representatives," or to "executors or administrators," has been the subject of much controversy; the questions being (1) whether the gift to representatives applies to executors or administrators, or to the persons entitled on intestacy; and if to the former, then (2) whether the executors or administrators take the property beneficially, or only as part of the personal estate of the testator.

That the word "representatives" means the same as "legal personal representatives," see *Re Crawford's Trusts*, 2 Drew. 230; 23 L. J. Ch. 625; *Atherton* v. *Crowther*, 19 Be. 448; *Re Henderson*, 28 Be. 656. And that "legal representatives," "personal representatives," or "legal personal representatives," ordinarily and *prima facie* mean "executors or administrators," see *Price* v. *Strange*, 6 Mad. 159; *Smith* v. *Barneby*, 2 Col. 728; 16 L. J. Ch. 466; *Re Turner*, 2 Dr. & S. 501; 34 L. J. Ch. 660; *Re Ware*, 45 Ch. D. 269; 59 L. J. Ch. 717; Hawkins, Constr. Wills, 141. But the expressions "personal" and "legal representatives" are not necessarily identical in meaning, *Kilner* v. *Leech*, 10 Be. 362; 16 L. J. Ch. 503. See also *Topping* v. *Howard*, 4 De G. & S. 268, and *Re Roberts*, [1903] 2 Ch. 200; 72 L. J. Ch. 597.

Executors or administrators not entitled for their own benefit.

To hold the executors or administrators of a legatee to be beneficially entitled is so manifestly contrary to the probable intention, that the case of *Evans* v. *Charles*, 1 Anst. 128, in which this construction prevailed, has been generally condemned; the judge whose solitary approba-

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tion it has elicited did not think proper to follow its authority; see *Long* v. *Blackall*, 3 Ves. 486; and it is now overruled by several later cases. See *Long* v. *Watkinson*, 17 Be. 471; 21 L. J. Ch. 844; *Ellcock* v. *Mapp*, 3 H. L. C. 492; 18 L. J. Ch. 217; *Read* v. *Stedman*, 26 Be. 495; 28 L. J. Ch. 481; *Williams* v. *Roberts*, 27 L. J. Ch. 177; *Re Valdez's Trusts*, 40 Ch. D. 159; 58 L. J. Ch. 861. And see *Meryon* v. *Collett*, 8 Be. 386; 14 L. J. Ch. 369, where it was held that the next of kin were entitled under a limitation by deed of a fund "to the executors or administrators" of the settlor "to and for his and their own use and benefit."

11 Geo. 4 & 1 Will. 4, c. 40 (Executors Act, 1830).

By express enactment (11 Geo. 4 & 1 Will. 4, c. 40), executors were excluded from taking beneficially, by virtue of their office, even the undisposed-of personalty of their testator, unless it appear by the will to be otherwise intended, see *Saltmarsh* v. *Barrett*, 3 D. F. & J. 279; 30 L. J. Ch. 853; *Barrs* v. *Fewkes*, 2 H. & M. 60; 33 L. J. Ch. 484; *Bird* v. *Harris*, L. R. 9 Eq. 204; 39 L. J. Ch. 226; *Chester* v. *Chester*, L. R. 12 Eq. 444; *Travers* v. *Travers*, L. R. 14 Eq. 275; *Re Jones*, [1925] 1 Ch. 340. Accordingly, in *Stocks* v. *Dodsley*, 1 Ke. 325, where a testator bequeathed £500 to B. after the death of A., and if B. should die in the lifetime of A., then to such persons as B. should by will appoint, and in default of such appointment, to the executors and administrators of B. absolutely, it was held that the executor of B. did not take beneficially, but was bound to apply the legacy according to the purposes of the will of B. It is, however, a question of intention, to be gathered from the will itself, whether a person is to have a beneficial interest or take as executor, *Williams* v. *Arkle*, L. R. 7 H. L. 606; 45 L. J. Ch. 590, where the intention of the Executors Act, 1830, was considered. See also *Re Roby*, [1908] 1 Ch. 71; 77 L. J. Ch. 169. And see note (*l*), *infra*. Where a testatrix directed that the residue "shall be at the discretion of my executor and at his own disposal," it was held in *Re Howell*, [1915] 1 Ch. 241; 84 L. J. Ch. 209 (distinguished in *Re Chapman*, [1922] 2 Ch. 479), that he took beneficially. This statute was held to apply only as between executors and next of kin, *Hawkins* v. *Hawkins*, 7 Sim. 173; 4 L. J. Ch. 9; *Taylor* v. *Haygarth*, 14 Sim. 8; *Re Knowles*, 49 L. J. Ch. 625. Where, owing to the illegitimacy of the testator, there existed no next of kin, it was held that the old law, as it existed before the statute, must still be applied, *Re Bacon's Will*, 31 Ch. D. 460; 55 L. J. Ch. 368; *Att.-Gen.* v. *Jefferys*, [1908] A. C. 411; 77 L. J. Ch. 684. But the Executors Act, 1830, is now repealed by the Administration of Estates Act, 1925, which by sect. 46 (vi) will, in the case of deaths after 1925, prevent executors from claiming the residue undisposed of against the Crown.

Next of kin, under the statute take, when.

This question cannot arise, unless it is adjudged that the executors or administrators are the intended objects of the gift, which seems not to be the invariable construction; for, in some cases, a gift to "legal," *Price* v. *Strange*, 6 Mad. 159, or "personal" representatives, *Robinson* v. *Smith*, 6 Sim. 47; 2 L. J. Ch. 76, was held to apply to next of kin, who, as persons entitled under the Statute of Distributions to the personal estate of the deceased, might be said in a general and popular sense to "represent" him.

"Legal representatives."

In *Bridge* v. *Abbott*, 3 Br. C. 224, which is a leading authority for this construction (see also *Long* v. *Blackall*, 3 Ves. 486), a testatrix having made a bequest to certain persons, and in case of the death of any of them before her, to their "legal representatives," the next of kin

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under the statutes were held entitled. So, in *Baines* v. *Ottey*, 1 M. & K. 465; 1 L. J. (N.S.) Ch. 210, where a testator gave certain real and personal estate to trustees, in trust for such persons as A., a married woman, should appoint, and in default of appointment for her separate use, and at her decease to convey the real estate to such person as would be the heir-at-law of the said A., and to assign the personal estate to or amongst such persons as would be the "personal representatives" of A., the next of kin under the statute were held entitled, see also *Cotton* v. *Cotton*, 2 Be. 67; 8 L. J. (N.S.) Ch. 349; *Smith* v. *Barneby*, 2 Col. 728; 16 L. J. (N.S.) Ch. 466; *Walker* v. *Marquis of Camden*, 16 Sim. 329; 17 L. J. Ch. 488; *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359; 36 L. J. Ch. 793; *Re Gryll's Trusts*, L. R. 6 Eq. 589. In *Re Horner*, 37 Ch. D. 695; 57 L. J. Ch. 211, "representatives" was held not to mean "executors and administrators," and it was not necessary in the circumstances to decide whether it meant next of kin or descendants, see *Re Clay*, 54 L. J. Ch. 648. After 1925 an executor will hold the part of property not effectively disposed of by a testator in trust for the persons entitled under that Act on intestacy, unless it appears by the will that he is intended to take such part beneficially. Administration of Estates Act, 1925, s. 49.

"Personal representatives."

"Executors and administrators," &c., when words of limitation.

We must carefully distinguish, however, those cases in which the words "executors and administrators" or "legal representatives" are used as words of limitation, as in the case of a gift to A. and his executors or administrators, or to A. and his legal representatives, which will, beyond all question, vest the absolute interest in A., *Lugar* v. *Harman*, 1 Cox, 250; *Mackenzie* v. *Mackenzie*, 2 M'N. & G. 559; 21 L. J. Ch. 465; *Att.-Gen.* v. *Malkin*, 2 Ph. 64; *Re Seymour's Trusts*, Joh. 472; 28 L. J. Ch. 765; *Johnson* v. *Routh*, 27 L. J. Ch. 305; *Devall* v. *Dickens*, 9 Jur. 550; *Alger* v. *Parrott*, L. R. 3 Eq. 328; *Meryon* v. *Collett*, 8 Be. 386; 14 L. J. Ch. 369; *Hames* v. *Hames*, 2 Ke. 646; 7 L. J. Ch. 123; *Morris* v. *Howes*, 4 Ha. 599; 16 L. J. Ch. 121; *Price* v. *Strange*, 6 Mad. 159. In *Grafftey* v. *Humpage*, 1 Be. 46; 8 L. J. Ch. 98, where under a bequest to A. and B. and the survivor, for life, and on a certain contingency to such persons as B. should appoint, and in default of appointment to the executors, administrators, or assigns of B., B. was held to be entitled absolutely, see also *Holloway* v. *Clarkson*, 2 Ha. 521; Co. Litt. 54, b. It seems to be clear that neither the widow, *Garrick* v. *Lord Camden*, 14 Ves. 372; *Lee* v. *Lee*, 1 Dr. & S. 85; 29 L. J. Ch. 788; nor the husband, *Milne* v. *Gilbart*, 5 D. M. & G. 510; 23 L. J. Ch. 828, is entitled under a gift in terms either to the next of kin *simpliciter*, or by reference to intestacy or the Statutes of Distribution. See as to what enactments are referred to in references to the "Statutes of Distribution" in wills coming into operation before 1926, or after 1925, sect. 50 of the Administration of Estates Act, 1925. The claim of the representative of next of kin under a gift to "next of kin," however, had been the subject of many conflicting decisions and dicta, until the case of *Elmsley* v. *Young*, 2 M. & K. 82, 780; 4 L. J. Ch. 200, in which the Lords Commissioners decided in favour of the strict construction, and held that, under a gift to next of kin, a surviving brother was entitled, in exclusion of the children of a deceased brother. See also *Withy* v. *Mangles*, 10 C. & F. 215; *Avison* v. *Simpson*, Joh. 43; *Rook* v. *Att.-Gen.*, 31 Be. 313; 31 L. J. Ch. 791; and *Halton* v. *Foster*, L. R. 3 Ch. 505; 37 L. J. Ch. 547, where under gifts of personalty to "the next of kin"

Whether wife and representatives of next of kin entitled under gift to next of kin or its synonyms.

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it was held that the nearest of kindred in blood were entitled, and not those who would be entitled under the Statutes of Distribution. See also *Re Richards*, [1910] 2 Ch. 74; 79 L. J. Ch. 500. And the nearest in blood, if more than one, take as joint tenants, *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359; 36 L. J. Ch. 793. The terms "next of kin" and "next or nearest of blood" are synonymous, *Cooper* v. *Denison*, 13 Sim. 290; 12 L. J. Ch. 275. See further note (*f*) to Prec. 24.

Conflicting claims of next of kin and residuary legatee.

In *Scott* v. *Moore*, 14 Sim. 35; 13 L. J. Ch. 283, the Court had to decide between the conflicting claims of the next of kin and the residuary legatee of a testator, under a declaration that a trust fund in a certain event should be considered as part of his personal estate, and go in due course of adminstration; the legatee was held entitled. And see *Hewitson* v. *Todhunter*, 22 L. J. Ch. 76, where a legacy was bequeathed to A., and in case he should die in testator's lifetime (which happened) it was directed that the legacy should devolve upon A.'s "personal representatives"; Sir J. Stuart, V.-C., decided against both the executor and the next of kin of A., and in favour of his residuary legatee.

Gifts to "heirs," "next of kin," &c.

For the construction of a bequest "to and among my heirs-at-law, share and share alike," see *Ware* v. *Rowland*, 2 Ph. 635; 17 L. J. Ch. 147. "Heir" and "heir-at-law" meant the same thing in a freehold limitation, *Re Hack*, [1925] 1 Ch. 633. See as to the construction of the words "heirs" and "family," as applicable to dispositions of real and personal estate respectively, *White* v. *Briggs*, 2 Ph. 583; 17 L. J. Ch. 196; of "offspring," *Lister* v. *Tidd*, 29 Be. 618; of "descendants," *Best* v. *Stonehewer*, 34 Be. 66; 34 L. J. Ch. 26; of a gift of stock to "issue male," *Lywood* v. *Kimber*, 29 Be. 38; 30 L. J. Ch. 507; and of a devise to the "first male heir," *Doe* v. *Perratt*, 9 C. & F. 606; "nearest male heir," *Lightfoot* v. *Maybery*, [1914] A. C. 782; 83 L. J. Ch. 627; the words "eldest son," assisted by the context, held to be words of limitation, *Lewis* v. *Puxley*, 16 M. & W. 733; 16 L. J. Ex. 216. A devise to A. "and his male heir for ever," was held to give A. an estate in tail male under the rule in *Shelley's Case*, 1 Rep. 93, b; *Silcocks* v. *Silcocks*, [1916] 2 Ch. 161; 85 L. J. Ch. 464. But by sect. 131 of the Law of Property Act, 1925, the rule in *Shelley's Case* is abolished, and words which would under that rule have been words of limitation take effect in wills coming into operation after 1925, as words of purchase in equity (sect. 132). See also *Thellusson* v. *Lord Rendlesham*, 7 H. L. C. 429; 28 L. J. Ch. 948; *Thellusson* v. *Robarts*, 7 W. R. 563, where "eldest male lineal descendant" was held to mean the eldest son in point of line or stock, and not of personal age. On the word "heir" in a bequest of personalty, see *Doody* v. *Higgins*, 2 K. & J. 729; 25 L. J. Ch. 773; *Re Gamboa's Trusts*, 4 K. & J. 756; *Re Rootes*, 1 Dr. & S. 228; 29 L. J. Ch. 868; *Powell* v. *Boggis*, 35 Be. 535; 35 L. J. Ch. 472; *Re Newton's Trusts*, L. R. 4 Eq. 171; 37 L. J. Ch. 23; *Finlason* v. *Tatlock*, L. R. 9 Eq. 258; 39 L. J. Ch. 422; *Re Steevens' Trusts*, L. R. 15 Eq. 110. But in the case of limitations or trusts, coming into operation after 1925, see sect. 132 of the Law of Property Act, 1925. The cases given in this paragraph were decided under the system of law in force before 1926, and in cases to be decided on wills coming into operation after 1925, sect. 131 of the Law of Property Act, 1925, and on limitations or trusts arising after 1925, sect. 132 of that Act must be borne in mind. The distribution of the estate on intestacy will, in the case of persons dying after 1925, be governed by Part IV. of the Administration Act, 1925. Where realty and personalty were blended,

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see *Wingfield* v. *Wingfield*, 9 Ch. D. 658; 47 L. J. Ch. 768; *Keay* v. *Boulton*, 25 Ch. D. 212; 54 L. J. Ch. 48; where the bequest was to "the heirs or next of kin of A., deceased," the statutory next of kin took, *Re Thompson's Trusts*, 9 Ch. D. 607; 48 L. J. Ch. 135; where the bequest was to A. for life, and on his decease to his "lawful heir or heirs," the latter words were read literally, *Smith* v. *Butcher*, 10 Ch. D. 113; 48 L. J. Ch. 136. But see *Comfort* v. *Brown*, 10 Ch. D. 146; 48 L. J. Ch. 318. As to "heir of my family," see *Tetlow* v. *Ashton*, 20 L. J. Ch. 53; for gifts to next of kin or descendants of a particular surname, *Carpenter* v. *Bott*, 15 Sim. 606; 16 L. J. Ch. 433; *Re Roberts*, 19 Ch. D. 520; 50 L. J. Ch. 265; a devise to right heirs of the testator's name, *Thorpe* v. *Thorpe*, 1 H. & C. 326; 32 L. J. Ch. 79; to "my nearest of kin by way of heirship," *Williams* v. *Ashton*, 1 J. & H. 115; to "next lawful heirs," *Haslewood* v. *Green*, 28 Be. 1; as to the meaning of "next of kin in the male line," *Sayer* v. *Bradly*, 5 H. L. C. 873; 25 L. J. Ch. 593; "heirs and assigns of survivor," *Milman* v. *Lane*, [1901] 2 K. B. 745; 70 L. J. K. B. 731; and as to the period of vesting of a devise to the person who "shall be the male relation nearest in blood," to A. the first tenant for life of a series of limitations, *Stert* v. *Platel*, 5 Bing. N. C. 434; 87 L. J. (N.S.) C. P. 249. In *Re Amos*, [1891] 3 Ch. 159; 60 L. J. Ch. 570, a devise to A. "for his life and the life of his heir" was held legally valid, the effect being to give A. an estate during his own life and the life of the person who should be ascertained to be his heir at the time of his death.

On gifts to "family" or "relations" compare note (*e*) to Prec. 10; see also on this subject, and generally on gifts to descendants (*Re Hickey*, [1917] 1 Ch. 601; 86 L. J. Ch. 385), issue, next of kin, personal representatives, executors or administrators, and persons of testator's blood and name, Jarm, Wills, ch. 41. For the meaning of "British subjects of British descent," see *Re Churchill*, 34 T. L. R. 186.

As to the payment of legacies to minors.

15 Geo. 5, c. 19.

15 Geo. 5, c. 23.

(*i*) An executor is not authorised, without an express direction, to pay even a vested legacy to a minor legatee; still less is he warranted in so dealing with a legacy which (like that in the text) is contingent until the majority of the legatee. But an executor can discharge himself of a legacy which belongs to an infant by paying it into Court under the Trustee Act, 1925, s. 63, or by making an appointment of trustees under sect. 42 of the Administration of Estates Act, 1925.

Under sect. 31 of the Trustee Act, 1925, trustees may apply the income of an infant's property for his benefit, and in trusts created after 1925, an advancement to the extent of one-half of a share or interest may be made under sect. 32 of that Act. Married infants have, under sect. 21 of the Law of Property Act, 1925, power to give valid receipts for income.

(*k*) See note (*f*) to Prec. 7.

As to legacies to executors.

(*l*) These words are inserted to show that the executor is to have the legacy whether he proves the will or not. See Hawkins, Constr. Wills, 362. The intention on this point should always be indicated in framing legacies to executors. The effect of declaring a legacy to be in consideration of the executor's trouble, and indeed of giving it simply to the executor without any explanatory declaration of the motive, would be to annex the legacy to the office, *Calvert* v. *Sebbon*, 4 Be. 222; *Slaney* v. *Watney*, L. R. 2 Eq. 418; 35 L. J. Ch. 783, and this probably is in general the intention. *Secus*, where it is expressed to be as a mark of esteem, *Burgess* v. *Burgess*, 1 Col. 367; or "as a remembrance," *Bubb* v. *Yelverton*, L. R. 13 Eq. 131, or where it is given to one of the

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executors exclusively in addition to a previous legacy to all, though the bequest be to them *nominatim*, without any allusion to the office, *Cockerell* v. *Barber*, 2 Russ. 585; 5 L. J. Ch. 77. See also *Compton* v. *Bloxham*, 2 Col. 201; 14 L. J. Ch. 380; *Hollingsworth* v. *Grasett*, 15 Sim. 52; *Wildes* v. *Davies*, 1 S. & G. 475; 22 L. J. Ch. 495; *Angermann* v. *Ford*, 29 Be. 349; *Re Denby*, 3 D. F. & J. 350; 31 L. J. Ch. 184; 4 Dav. Conv. 95. Where there was a gift of residue to the executors equally, as a recompense for their trouble, and one died in the testator's lifetime, it was held that there was no lapse, and the survivors took the whole, *Knight* v. *Gould*, 2 M. & K. 295; but where one renounced probate, his share lapsed, *Barber* v. *Barber*, 3 M. & C. 688; 8 L. J. (N.S.) Ch. 36. And in *Hoare* v. *Osborne*, 33 L. J. Ch. 586, where one died in testator's lifetime, and another attested the will, it was held that both shares lapsed. As to what is sufficient acting as executor, or intention to act, see *Lewis* v. *Mathews*, L. R. 8 Eq. 277; 38 L. J. Ch. 510. In *Jewis* v. *Lawrence*, L. R. 8 Eq. 345, the inequality and the difference in the nature of the subject-matter of two bequests to the persons named as executors rebutted the presumption of the legacy being conditional on the executors proving the will, but the Court of Appeal in *Re Appleton*, 29 Ch. D. 893; 54 L. J. Ch. 954, doubted *Jewis* v. *Lawrence*, and held that there is no general rule, that a difference either in the nature or amount of the legacies given to the persons named as executors is enough to show that the gifts are not attached to the office. Cotton, L.J., said that parol evidence is admissible to rebut the presumption that the gift is annexed to the office. And see *Re Bacon's Will*, 31 Ch. D. 460; 55 L. J. Ch. 368. But see Wigram, Extr. Evidence, 227. In *Re Reeve's Trusts*, 4 Ch. D. 841; 46 L. J. Ch. 412, the presumption was rebutted by the legacy not being payable until the death of tenant for life. Where a testator gave to his trustees, "for their services and collecting of rents, &c.," an annuity of £25, and they employed a collector of the rents and the chief clerk allowed the trustees in taking their accounts a sum of £80 paid to the collector, they were held not entitled to the annuities, *Re Muffet*, 56 L. J. Ch. 600.

Bequests to servants.

(*m*) A bequest to testator's "servants" includes those who are in his service at the date of the will, *Parker* v. *Marchant*, 1 Y. & C. 290; *Re Bell*, [1914] W. N. 89; though the gift may be construed to include those only in his service at his death, *Jones* v. *Henley*, 2 Ch. Rep. 162. As to those occasionally employed, see *Townshend* v. *Windham*, 2 Ver. 546; *Thrupp* v. *Collett*, 26 Be. 147; a temporary absence from actual service at the testator's death does not disentitle one otherwise entitled, *Herbert* v. *Reid*, 16 Ves. 486; *Re Cole*, [1919] 1 Ch. 218; 88 L. J. Ch. 82.

A bequest "to each of my servants one year's wages over and above what may be due to them at the time of my decease," is confined to servants hired by the year, *Booth* v. *Dean*, 1 M. & K. 560; 2 L. J. (N.S.) Ch. 162; *Blackwell* v. *Pennant*, 9 Ha. 551; 22 L. J. Ch. 155; *Re Ravensworth*, [1905] 2 Ch. 1; 74 L. J. Ch. 353. But if the bequest is of a gross sum to be divided amongst the servants, persons continuously employed at weekly wages are included, *Thrupp* v. *Collett*, *ubi sup.* And see, where the preceding cases are distinguished, *Re Sheffield* (*Earl*), [1911] 2 Ch. 267; 80 L. J. Ch. 521.

In estimating the amount of a gift of "a sum equivalent to two months of their respective current salaries or wages at my decease," payments by commission were not taken into consideration, *Re Smith*, [1915] W. N. 12.

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A gift to "servants in my domestic establishment," was held to include only indoor servants, in *Ogle* v. *Morgan*, 1 D. M. & G. 359; *Re Ogilby*, [1903] 1 Ir. R. 525; and in *Jones* v. *Henley*, *ubi sup.*, where the gift was simply "£100 a piece to all my servants," it was held that those only were entitled who lived in the house with the testator. But in *Townshend* v. *Windham*, *ubi sup.*, the expression "such of my servants as shall be living with me at my death," was held not to exclude servants living in a different house; and similar decisions were given in *Blackwell* v. *Pennant* and *Thrupp* v. *Collett*, *ubi sup.* And see *Re Jackson*, [1923] 2 Ch. 365. As to "domestic servant," see *Re Lawson*, [1914] 1 Ch. 682; 83 L. J. Ch. 519; considered in *Re King*, [1917] 2 Ch. 420; 87 L. J. Ch. 3; and *Re Jackson*, *ubi sup.* And see as to a farm labourer, *Re Forrest*, [1916] 2 Ch. 386; 85 L. J. Ch. 784, and a hospital nurse, *Re Travers*, [1916] W. N. 348; and a resident land agent, *Re Countess of Rosse*, [1923] W. N. 148; 93 L. J. Ch. 8; *Re Earl Brownlow*, 69 S. J. 176. A bequest "to each man who shall have been in my employ over ten years," *held* to extend to a man who had been in the testator's employ for fifteen years, but who was not in his employment at the time of his death, *Re Sharland*, [1896] 1 Ch. 517; 65 L. J. Ch. 280. Legatees whose periods of service were not continuous but interrupted by military service were held entitled to take in *Re Drake*, [1921] 2 Ch. 99.

See also *Armstrong* v. *Clavering*, 27 Be. 226; *Darlow* v. *Edwards*, 1 H. & C. 547; 32 L. J. Ex. 51; *Venes* v. *Marriott*, 31 L. J. Ch. 519; *Re Cassel*, 39 T. L. R. 75. See *post*, p. 231.

(*n*) See note (*f*), Prec. 9.

Bequests of stock.

(*o*) The word "money" in a will does not pass stock in the public funds, unless its meaning is enlarged by the context, *Lowe* v. *Thomas*, 5 D. M. & G. 315; 23 L. J. Ch. 616; *Collins* v. *Collins*, L. R. 12 Eq. 455; 40 L. J. Ch. 541; *Re Sutton*, 28 Ch. D. 464; 54 L. J. Ch. 613; or it can be gathered from the whole will, and the facts of the case, that such was the testator's intention, *Chapman* v. *Reynolds*, 28 Be. 221; 29 L. J. Ch. 594; *Gover* v. *Davis*, 29 Be. 222; 30 L. J. Ch. 505; *Re Townley*, 53 L. J. Ch. 516; *Re Cadogan*, 25 Ch. D. 154; 53 L. J. Ch. 207; *Montagu* v. *Earl of Sandwich*, 33 Be. 324; *Nevinson* v. *Lady Lennard*, 34 Be. 487. See also *Cowling* v. *Cowling*, 26 Be. 449, where stock in the funds was held not to pass by a bequest of "my goods and furniture, my plate and linen, all money and notes that may be due to me at my decease." The addition of "&c." to a bequest like the above will carry only things *ejusdem generis*, *Newman* v. *Newman*, 26 Be. 220; *Barnaby* v. *Tassell*, L. R. 11 Eq. 363; but where the will shows an intention to dispose of everything, "&c." will carry the whole personal estate, *Chapman* v. *Chapman*, 4 Ch. D. 800; 46 L. J. Ch. 104. South Sea Stock and $3\frac{1}{4}$ per Cents. were held, on the context, to pass by the expression "surplus money," *Newman* v. *Newman*, 26 Be. 218. See also *Thomas* v. *Thomas*, 27 Be. 537; 29 L. J. Ch. 281, in which case the testator left to his grandson "all the bank stock which he should be possessed of or entitled to at the time of his death"; on December 27, 1858, he directed the purchase of £5,000 bank stock, obviously with a view of increasing the legacy to his grandson; the stock was bought at the earliest possible moment, but the testator died on the day of, but five hours before, the purchase; the grandson was held not to be entitled to the £5,000.

Et cætera.

Bank stock.

A bequest of "my bank stock," was held to pass $3\frac{1}{4}$ per Cents., the testator having no other stock, either at the date of his will, or at his

death, *Drake* v. *Martin*, 23 Be. 89; 26 L. J. Ch. 786. But where a testator has stock which answers the description in his will, though different in amount, the description will not be extended so as to include stock of a different description, *Gilliat* v. *Gilliat*, 28 Be. 481. Bank stock will not pass under a bequest of "money and securities for monies," *Ogle* v. *Knipe*, L. R. 8 Eq. 434; 38 L. J. Ch. 692. And see *Re Hutchinson*, 88 L. J. Ch. 352. War stock was held not to pass under "war bonds" in *Re Balchin*, 67 S. J. 12; compare *Re Ionides*, 66 S. J. 315. As to what securities are within the meaning of "stocks in the foreign funds," see *Ellis* v. *Edcn*, 23 Be. 543; 25 Be. 482; 26 L. J. Ch. 533. In *Hull* v. *Hill*, 4 Ch. D. 97, Australian bonds did not pass under a bequest of foreign bonds. Long annuities pass as "stock and money in the funds," *Grant* v. *Mussett*, 2 L. T. 133; or as "public funds or government securities," *Wilday* v. *Sandys*, L. R. 7 Eq. 455.

Foreign funds.

Long annuities.

In the absence of any other bequest of residuary personalty, a bequest of "money that may remain after the payment of my debts" includes the general residue of personalty; and such a bequest of "money" has been held to pass the testator's reversionary interest in a sum charged on real estate, *Stocks* v. *Barré*, Joh. 54. And see *Montagu* v. *Earl of Sandwich*, 33 Be. 342; *In b. White*, 7 P. D. 65; 51 L. J. P. 40; *Re Egan*, [1899] 1 Ch. 688; 69 L. J. Ch. 307; *O'Connor* v. *O'Connor*, [1911] 1 Ir. R. 263; *Re Capel*, [1914] W. N. 465; *Re Skillen*, [1916] 1 Ch. 518; 85 L. J. Ch. 383; *Re Gliddon*, [1917] 1 Ch. 174; 86 L. J. Ch. 253; *Re Woolley*, [1918] 1 Ch. 33; 87 L. J. Ch. 169; *Re Taylor*, [1923] 1 Ch. 99; 91 L. J. Ch. 801.

Bequest of "money."

A bequest of "ready money" includes not only cash in the house, but cash at a banker's upon an ordinary account current, *Parker* v. *Marchant*, 1 Ph. 356; 12 L. J. Ch. 385; or in a savings-bank, such money being payable on demand or the required notice to pay having been given and the time expired before the testator's death, *Re Powell's Trust*, Joh. 49. But a bequest of "ready money" does not include promissory notes or notes of hand, *ib.* And money on deposit at a bank withdrawable at fourteen days' notice is not "ready money," *Re Wheeler*, [1904] 2 Ch. 66; 73 L. J. Ch. 576; but such money if withdrawable without notice may be "cash at my Bankers," *Re Boorer*, [1908] W. N. 189; nor is it a "pecuniary investment," *Re Price*, [1905] 2 Ch. 55; 74 L. J. Ch. 437. And see *Re Sudlow*, [1914] W. N. 424. But a bequest of "moneys owing" will pass money to the testator's credit on a deposit account, because the relationship existing between the testator and his banker is that of debtor and creditor, *Re Derbyshire*, [1906] 1 Ch. 135; 75 L. J. Ch. 95. A bequest of money deposited in the post-office savings-bank will include consolidated stock bought through the post office savings-bank with money standing to the credit of the testator's deposit account, *Re Adkins*, 98 L. T. 667; *secus*, where there is a residuary gift, *Re Mann*, [1912] 1 Ch. 388; 81 L. J. Ch. 217.

"Ready money."

Where the question is as to what is included in some general popular term or description, it seems impossible to lay down any rule; the intention of the testator must be gathered from the whole instrument. Accordingly, in *Langdale* v. *Whitfield*, 4 K. & J. 426; 27 L. J. Ch. 795, the word "moneys" in a codicil was held to comprise not only money in hand, but moneys due upon securities or otherwise; and this notwithstanding express mention in the will of "moneys and securities for money." As to what is included in a bequest of "money in bank," see *Harper's Trustees* v. *Bain*, 5 F. 716—Ct. of Sess.; *Re Glendinning*,

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[1918] W. N. 370; and what is a bequest of "securities," see *Re Johnson*, 89 L. T. 520; *Re Rayner*, [1904] 1 Ch. 176; 73 L. J. Ch. 111. See, however, *Williams* v. *Williams*, 8 Ch. D. 789; 47 L. J. Ch. 850.

Under a bequest of "all moneys deposited or invested in banks or institutions or owing to me," a sum in consols was held to pass, *Re Harding*, 55 S. J. 93. And see *Re Taylor*, [1923] 1 Ch. 99.

Money on deposit at bank.

An I O U, containing no promise to pay, is not a "security for money," *Barry* v. *Harding*, 1 J. & L. 483; and a banker's receipt for money on deposit is a mere I O U, evidence of a debt but not a security, *Hopkins* v. *Abbott*, L. R. 19 Eq. 222; 44 L. J. Ch. 316; compare *Re Drummond-Hay*, 67 S. J. 247; But a vendor's lien for unpaid purchase-money is a "security for money," *Callow* v. *Callow*, 42 Ch. D. 550; 58 L. J. Ch. 698. See Jarm. Wills, ch. 35, iv.—B. (2).

(*p*) See as to the cost of sending a specific legacy, 68 Sol. J. 750, and the cases there cited.

Construction of gifts to illegitimate children.

(*q*) A gift to children or issue means legitimate children or issue only, unless it appears from the context or from the circumstances that illegitimates must have been intended, *Wilkinson* v. *Adam*, 1 V. & B. 422. And see *Re Taylor*, [1925] W. N. 168. The person or persons intended to take should therefore be described as unmistakably as possible. See Jarm. Wills, ch. 43; Hawkins, Constr. Wills, Ch. 8; and see *Re Hammond*, [1911] 2 Ch. 342; 80 L. J. Ch. 690; *Re Pearce*, [1914] 1 Ch. 254; 83 L. J. Ch. 266; *Re Helliwell*, [1916] 2 Ch. 580; 86 L. J. Ch. 45; *Re Cullum*, [1924] 1 Ch. 540; 93 L. J. Ch. 281. As to the status of children by a deceased wife's sister, see *Re Green*, [1911] 2 Ch. 275; 80 L. J. Ch. 623; *Re Butler*, [1918] 1 I. R. 394; *Re Bleckley*, [1920] 1 Ch. 450.

As to restraints on alienation.

(*r*) The law of England does not allow the owner of property to bestow it on another deprived of its incidents. Of these incidents the right of alienation is one of the most important, and it has been guarded with a jealousy natural in a commercial country, whose obvious policy it is to promote the free circulation and interchange of property. Hence it has become an established doctrine, that where real and personal estate is given to a man during his life, or for any definite estate or interest of greater or less extent, accompanied with the strongest injunction against his aliening it, the prohibition is nugatory, and the devisee or legatee enjoys unfettered his disposing power, see *Renaud* v. *Tourangeau*, L. R. 2 P. C. 4; 37 L. J. P. C. 1. Upon a similar principle, and for reasons of policy still more obvious, the most positive and emphatic expression of a wish to devote the property to the personal and exclusive benefit of the devisee or legatee does not, in the event of his becoming bankrupt, prevent it from devolving to the trustees in whom the law in such case has vested his general property, *Brandon* v. *Robinson*, 18 Ves. 429; *Graves* v. *Dolphin*, 1 Sim. 66; 5 L. J. (N.S.) Ch. 45; *Younghusband* v. *Gisborne*, 1 Col. 400, affirmed 15 L. J. Ch. 355.

Income to cease on alienation.

The mere ownership of income, however, though it cannot (except in one instance presently noticed, p. 208) be the subject of an inalienable trust, may be made to cease on alienation, bankruptcy, or other such event, see *Martin* v. *Margham*, 14 Sim. 230; 13 L. J. Ch. 392; *Rochford* v. *Hackman*, 9 Ha. 475; 21 L. J. Ch. 511; *Re Dickson's Trust*, 1 Sim. (N.S.) 37; 20 L. J. Ch. 33; *Jones* v. *Wyse*, 2 Ke. 285; 7 L. J. Ch. 107; *Montefiore* v. *Enthoven*, L. R. 5 Eq. 35; 37 L. J. Ch. 43; *Hurst* v. *Hurst*, 21 Ch. D. 278; 51 L. J. Ch. 729; *Re Bedson's Trusts*, 28 Ch. D. 523; 54 L. J. Ch. 644; and it is in every day's practice to subject life

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interests, both in real and personal property, to determining provisos of this nature.

After 1925 income may be directed to be held on "protective trusts" under sect. 33 of the Trustee Act, 1925, which provides:

Protective trusts.

33.—"(1.) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called "the principal beneficiary") for the period of his life or for any less period, then, during that period (in this section called the "trust period") the said income shall, without prejudice to any prior interest, be held on the following trusts, namely:—

"(i) Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;

"(ii) If the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)—

"(a) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

"(b) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as the case may be;

as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

"(2) This section does not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

"(3) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside."

To what extent alienation may be restrained.

But an estate of inheritance in lands, or the entire interest in personalty, cannot be made liable to divestment even on alienation or bankruptcy, *Ware* v. *Cann*, 10 B. & C. 433; 8 L. J. K. B. 164; *Bradley* v. *Peixoto*, 3 Ves. 324; *Ross* v. *Ross*, 1 Jac. & W. 154; *Holmes* v. *Godson*, 8 D. M. & G. 152; 25 L. J. Ch. 317; *Whitfield* v. *Prickett*, 2 Ke. 608; 7 L. J. Ch. 187; *Re Machu*, 21 Ch. D. 838; *Re Dugdale*, 38 Ch. D. 176; *Re Ashton*, [1920] 2 Ch. 481; 89 L. J. Ch. 583; for the power of alienation is incidental to an estate in fee or a complete owner-

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ship of personalty, and any attempted general restraint on the exercise of this incident to ownership is repugnant to the estate, and therefore void; see the notes to *Bradley* v. *Peixoto* in Tud. L. C. R. P. In cases of this nature, the only mode of effectuating the design, often anxiously entertained by donors, of securing the *corpus* of the property against the acts of the donee himself and the claims of his creditors, is to invest a third person with a discretionary power either to give or to withhold it, as he may think proper; in short, absolutely to defer all proprietary title in the intended object of bounty until its actual application to his use by the testator's nominee, and ultimately to give to another (for this seems to be essential to the consistency and effectiveness of the scheme) what remains so unapplied at his decease. Nor is this all, for, according to the doctrine of *Piercy* v. *Roberts*, 1 M. & K. 4; 28 L. J. Ch. 17, in order to exclude the claim of the trustee in bankruptcy, the power should be made incapable of being exercised in favour of the bankrupt (supposing him to be the sole object of the power) after such event, or, in other words, the power should, on bankruptcy, be exercisable in favour of other persons, or the property given over as on death; otherwise it is considered as an unlawful attempt to continue the property in the bankrupt after the law has taken away his capacity to retain it, and consequently what remains unapplied belongs to the trustees. See also *Kearsley* v. *Woodcock*, 3 Ha. 185; *Wallace* v. *Anderson*, 16 Be. 533; *Sharp* v. *Cosserat*, 20 Be. 470; *Re Smith*, [1916] 2 Ch. 368; 85 L. J. Ch. 657. Of course, there is no objection to the power, in the event of bankruptcy, being made exercisable in favour of the wife or children of the bankrupt.

Discretionary power of trustees, how affected by bankruptcy of object.

Care must, however, be taken to prevent a discretionary trust being, by reason of the objects, void for remoteness. It can only be limited for a life or lives in being and twenty-one years afterwards, *Re Blew*, [1906] 1 Ch. 624; 75 L. J. Ch. 373.

The doctrine which prohibits the imposition of any general restraint on the alienation of the inheritance of lands and the absolute property in personalty has been held not to prevent the aliening power from being confined in its exercise to certain objects; as in the case of a gift to A. in fee, upon condition that, in a certain event, he shall have no power to dispose of the property, unless to his sisters and their children; this was held to be valid, *Doe* v. *Pearson*, 6 Ea. 173; as to which see *Attwater* v. *Attwater*, 18 Be. 330; 23 L. J. Ch. 692; and *Re Macleay*, L. R. 20 Eq. 186; 44 L. J. Ch. 441. A restraint extending to particular modes of conveyance is not admissible, and a devisee in fee must be left at liberty to dispose of the property by any and every species of assurance which is adapted to the nature of his estate, *Ware* v. *Cann*, 10 B. & C. 433; 8 L. J. K. B. 164.

As to a power to alien in favour of defined objects.

The single exception to the general doctrine respecting restraints on alienation is that in favour of married women who may be prevented from disposing of annual income given for their separate use (to which the power of alienation is otherwise incident) by mere words of restriction without any clause of forfeiture, *Jackson* v. *Hobhouse*, 2 Mer. 483. The restraint may be annexed to an absolute gift if the intention is clear, *Re Bown*, 27 Ch. D. 411; 53 L. J. Ch. 881; *Re Grey's Settlements*, 34 Ch. D. 712; 56 L. J. Ch. 511.

Alienation by a married woman may be restrained.

But restraint on anticipation of rents did not prevent an equitable tenant in tail from barring the entail, with the concurrence of her

husband, and devising the equitable fee simple, *Cooper* v. *Macdonald*, 7 Ch. D. 288; 47 L. J. Ch. 373.

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But a woman not under coverture is no more capable of being the object of an inalienable trust than a man. And where the *cestui que trust* is discovert at the death of the testator, and afterwards marries, the futurity of the latter event cannot detract from the force of the restriction, which will be exactly co-extensive with the coverture whenever contracted; and if the *cestui que trust* does not avail herself of the privilege of alienation resulting from her temporary discoverture, the restriction will adhere to her during any subsequent coverture, as firmly as if she had been married at the testator's decease. See the elaborate judgments of Lord Langdale and Lord Cottenham in *Tullett* v. *Armstrong*, 4 M. & C. 377; 9 L. J. (N.S.) Ch. 41; and 1 Hayes, Conv. 499. And see as to marriage after divorce, *Shafto* v. *Butler*, 40 L. J. Ch. 308.

Doctrine not applicable to unmarried women.

Separate use, future coverture.

Tullett v. *Armstrong*.

Since the Married Women's Property Act, 1882, a restraint on anticipation may be imposed without the words "separate use," *Re Lumley*, [1896] 2 Ch. 690; 65 L. J. Ch. 837.

A married woman restrained from anticipation cannot assign an apportioned part of current interest up to the date of the assignment, *Re Brettle*, 2 D. J. & S 79; 33 L. J. Ch. 471.

When once the restraint on anticipation was imposed, and by reason of coverture had become effectual, it was only by the determination of the coverture that the restraint could, until 1882, be removed. Thus, where a testator gave a legacy to a married woman upon condition that she conveyed within twelve months an estate devised to her by another testator for her separate use with a clause against anticipation, it was held that the Court had no power to interfere for the purpose of enabling the married woman to comply with the condition, *Robinson* v. *Wheelwright*, 6 D. M. & G. 535; 25 L. J. Ch. 385. And where a fund had been settled by order of the Court to the separate use of a married woman without power of anticipation, the Court would not disturb it, *Chapman* v. *Lamport*, 8 W. R. 466. But by sect. 169 of the Law of Property Act, 1925, which replaces sect. 7 of the Conveyancing Act, 1911, the Court can bind a married woman's interest in any property, notwithstanding a restraint, by order made with her consent and if it is for her benefit: see *Re Little*, 40 Ch. D. 418. It has been held that a settlement may be varied during a coverture after a divorce so as to override the restraint, under the Matrimonial Causes Act, 1859 and 1878, *Churchward* v. *Churchward*, [1910] P. 195; 79 L. J. P. 59; *Morgan* v. *Morgan and Kirby*, [1923] P. 1. See these cases discussed 67 Sol. J. 477. By sect. 61 of the Settled Land Act, 1882, a restraint on anticipation did not prevent the exercise by a married woman of powers conferred by that Act, and now by sect. 25 of the Settled Land Act, 1925, it will not prevent her from exercising the powers under that Act.

Restraint on anticipation can be dispensed with by the Court.

Conveyancing Act, 1911, s. 7.

Law of Property Act, 1925, s. 169.

Settled Land Act, 1882, s. 61.

See also on the doctrine of the wife's separate estate the notes to *Hulme* v. *Tenant*, 1 Br. C. 16, in 1 Wh. & Tud. L. C. Eq.; and see Seton, ch. 37, sect. ii. and notes.

(*s*) Though the legal possibility of issue continues down to the last moment of life, without distinction of sex, *Jee* v. *Audley*, 1 Cox, 324; *Ward* v. *Van der Loeff*, [1924] A. C. 653; 93 L. J. Ch. 397, yet Courts of Equity will liberate a fund, when, from the advanced age of a female, the probability of the birth of children is at an end, see *Re White*, [1901] 1 Ch. 570; 70 L. J. Ch. 300, and cases there cited; and see Seton, ch. 44, sect. 27 and notes; and Gray on Perpetuities, 3rd ed., 191, n. (*e*).

Possibility of issue down to death.

Equitable relief, in case of woman of advanced age.

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Gift to children, as a class;

—as to the period of the children coming into existence.

(*t*) The rules for ascertaining the objects of gifts to children as a class, so far as relates to the period of their coming into existence, are as follows: *First*, If no period of distribution is named, the class is ascertained at the death of the testator; and a gift which takes effect in possession immediately on the testator's decease in favour of the "children" of A., whether A. be living or dead, extends to children in existence at the death of the testator, if there are any such, and those only, *Hill* v. *Chapman*, 3 Br. C. 391; *Viner* v. *Francis*, 2 Cox, 190. *Secondly*, When a period of distribution is named, *that* is the time for ascertaining the class, *Hagger* v. *Payne*, 23 Be. 474; 26 L. J. Ch. 617. *Thirdly*, A gift to children, the distribution of whose shares is postponed until majority or some other age (which none of the class at the testator's decease has attained), embraces the children living at the testator's decease, and also those who come *in esse* before the eldest attains the prescribed age, when the distribution *pro tanto* (*i.e.* to such eldest child) takes place, and children born after that time are excluded, *Andrews* v. *Partington*, 3 Br. C. 401; *Gilbert* v. *Boorman*, 11 Ves. 238; *Gillman* v. *Daunt*, 3 K. & J. 48; *Gimblett* v. *Purton*, L. R. 12 Eq. 427; 40 L. J. Ch. 556; *Re Faux*, 84 L. J. Ch. 873; *Re Paul's Settlement Trusts*, [1920] 1 Ch. 99; 88 L. J. Ch. 530; as to a child *en ventre*, see *Re Hallett*, [1892] W. N. 148. But this rule applies only to the gift of an aggregate fund and not to a gift of income. In this case children coming into being after the eldest attains the prescribed age are let in to share in the periodical distribution of the income, *Re Wenmoth's Estate*, 37 Ch. D. 266; 57 L. J. Ch. 649. See also *Re Powell*, [1898] 1 Ch. 227; 67 L. J. Ch. 148; and *Re Stephens*, [1904] 1 Ch. 322; 73 L. J. Ch. 3; and Jarm. Wills, 1688 *et seq.*

Gifts to children, as a class.

Fourthly, A gift to children, preceded by a life interest, includes the children living at the death of the testator, and those who come *in esse* in the lifetime of the prior devisee or legatee, whose death is made the period of distribution, *Devisme* v. *Mello*, 1 Br. C. 537; *Leigh* v. *Leigh*, 17 Be. 605; 23 L. J. Ch. 287; *Odell* v. *Crone*, 3 Dow. 61; and such is the rule whenever the distribution is postponed to a future period, *Gardner* v. *James*, 6 Be. 170. But see *Re Shaw*, 56 S. J. 380. *Fifthly*, Where no child is in existence at the testator's decease, the devise or bequest, though framed as a gift in possession, will extend to all the children who afterwards come *in esse*, *Weld* v. *Bradbury*, 2 Ver. 705; *Harris* v. *Lloyd*, T. & R. 310. And a gift which appears on the face of the will as a future disposition in favour of children, but is reduced, by events happening in the testator's lifetime, to a gift in possession, falls within this rule, *Haughton* v. *Harrison*, 2 Atk. 329. And there is some ground for contending that the same doctrine applies where the gift in favour of children is preceded by a life interest which determines before any child is born, *Chapman* v. *Blissett*, Ca. t. Talb. 145; *Hutcheson* v. *Jones*, 2 Mad. 124; *Horseman* v. *Abbey*, 1 J. & W. 381; but see *Bartleman* v. *Murchison*, 2 R. & M. 136. In *Re Bedson's Trusts*, 28 Ch. D. 523; 54 L. J. Ch. 644, the gift to children at twenty-one was preceded by a life estate, but there was a proviso that in case of the bankruptcy of the tenant for life the fund and income should thenceforth go and be payable to or for the benefit of the child or children of the tenant for life "in the same manner as if he was naturally dead." The tenant for life having become bankrupt, it was held that the children who attained twenty-one would take whether born before or after the bankruptcy. But see *Re Curzon*, 56 S. J. 362.

In *Pruen* v. *Osborne*, 11 Sim. 132, a testator bequeathed his residue

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to several classes of persons. Some of the parties were members of two of the classes, and it was held, nevertheless, that they were entitled to only one share each of the residue.

Member of more than one class.

Where there is a gift to children at twenty-one, the general rule is that the class is fixed when the eldest child attains twenty-one, and no child born after can take. But if maintenance or advancement is continued after the eldest attains twenty-one—if, for instance, advancement is directed out of vested shares—all children will be let in, *Re Courtenay*, 74 L. J. Ch. 654. And compare *Re Deloitte*, [1919] 1 Ch. 209; 88 L. J. Ch. 112.

Freeholds of inheritance—executory devise, or contingent remainder.

With respect to freeholds of inheritance, where the legal estate was devised to A. for life, and after his death to his children, who "either before *or after* his death" should attain twenty-one, or to the children of B., born "either before *or after*" the death of A., all children attaining majority or born after A.'s death took by executory devise, *Re Lechmere & Lloyd*, 18 Ch. D. 524, followed in *Miles* v. *Jarvis*, 24 Ch. D. 636; 52 L. J. Ch. 796; *Dean* v. *Dean*, [1891] 3 Ch. 150; 60 L. J. Ch. 553; *Re Wrightson*, [1904] 2 Ch. 95; 73 L. J. Ch. 742; and *White* v. *Summers*, [1908] 2 Ch. 256; 77 L. J. Ch. 506. The want of a preceding estate of freehold never caused a failure of an equitable contingent remainder, *Abbis* v. *Burney*, 17 Ch. D. 211; 50 L. J. Ch. 348; *Re Brooke*, [1894] 1 Ch. 43; 63 L. J. Ch. 159; and such remainders retained their immunity from failure although subsequently clothed with the legal estate by the executors' assent under the Land Transfer Act, 1897, *Re Robson*, [1916] 1 Ch. 116. After 1925 an estate in remainder in land will take effect as an equitable interest only, Law of Property Act, 1925, s. 1 (3), and there will be no tenancy in common of a legal estate, but the tenants in common will be beneficiaries of the proceeds of sale and of the rents and profits until sale, Law of Property Act, 1925, s. 34.

Effect of expressions to extend or restrict the class.

In construing words expressly restricting or enlarging the class of children who are the objects of the gift, there seems in general to be no extension of the range of objects by the introduction of the word "all," *Scott* v. *Harwood*, 5 Madd. 332. It is also clear that the words "hereafter to be begotten," added to a future gift to children (*i.e.*, a gift under which the possession or distribution is postponed to a period subsequent to the death of the testator), have no effect in extending the class to objects born after the period of distribution, *Paul* v. *Compton*, 8 Ves. 375; *Whitbread* v. *Lord St. John*, 10 Ves. 152; *Gilbert* v. *Boorman*, 11 Ves. 238. Nor, on the other hand, do these words exclude existing children, *Hebblethwaite* v. *Cartwright*, Ca. t. Talb. 30; *Almack* v. *Horn*, 1 H. & M. 630; 32 L. J. Ch. 304; though a bequest in a codicil to "each child that may be born" to A. was held to apply only to children born after the date of the codicil, *Early* v. *Middleton*, 14 Be. 453; *Townsend* v. *Early*, 28 Be. 429; affirmed 3 D. F. & J. 1. But if the gift be immediate, *i.e.* to take effect in possession on the death of the testator, such words as "to be born" or "to be begotten," annexed to a general devise or bequest to children, have the effect of extending it to all the children who shall ever come into existence, *Mogg* v. *Mogg*, 1 Mer. 654; see also *Gooch* v. *Gooch*, 3 D. M. & G. 366; 22 L. J. Ch. 1089. See, however, Jarm. Wills, 1694 *et seq.* But this construction does not apply to pecuniary legacies where the consequence of letting in children born after the testator's death would be the postponement of the distribution of the testator's general estate until the death of the parent of the legatees, *Ringrose* v. *Bramham*, 2 Cox, 384; *Storrs* v. *Benbow*, 2 M. & K. 46;

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2 L. J. (N.S.) Ch. 201; *Butler* v. *Lowe*, 10 Sim. 317; *Mann* v. *Thompson*, Kay, 638; *Rogers* v. *Mutch*, 10 Ch. D. 25; 48 L. J. Ch. 133; in such cases the words of futurity are held to refer to the interval between the date of the will and the death of the testator. See also *Dias* v. *De Livera*, 5 App. Cas. 123; 49 L. J. P. C. 26.

Effect of events happening in testator's life.

It would seem that if the event, on the occurrence of which the persons constituting the class of children entitled are to be ascertained, happens in the lifetime of the testator, as in the case of a bequest to the children of A. who shall be living at the death of B., as tenants in common, and B. dies in the lifetime of the testator, the gift extends to the children of A., and those only, who are living at the death of B.; see *Allen* v. *Callow*, 3 Ves. 289; *Harvey* v. *Harvey*, 3 Jur. 949; but such a gift is still a gift to a class, *Lee* v. *Pain*, 4 Ha. 250; 14 L. J. (N.S.) Ch. 346; and if any child living at the death of B. afterwards dies in the testator's lifetime, the share of such child does not lapse, but the surviving children take the whole, *Leigh* v. *Leigh*, 17 Be. 605; 23 L. J. Ch. 287; *Cruse* v. *Howell*, 4 Drew. 215; *Dimond* v. *Bostock*, L. R. 10 Ch. 358.

If the gift be to the "children of A., to wit, B., C. and D.," it is considered to be made to the children, not as a class, but as individuals, *Bain* v. *Lescher*, 11 Sim. 397; and consequently the share of one who died in the testator's lifetime was held to be undisposed of. Also if from the terms of the will it appears that a bequest is made to persons, not as a class, but as individuals, and the share of one of them is revoked by a codicil, and the will is in other respects confirmed, the revoked share will fall into the residue, *Orford* v. *Orford*, [1903] 1 Ir. R. 121. But if a testator, after bequeathing to children as a class, revokes the bequest as to one of them, the entire subject of gift devolves to the rest, *Shaw* v. *M'Mahon*, 4 Dr. & War. 431. A gift to nephews and nieces, except A. and B., is a gift to a class, *Dimond* v. *Bostock, sup.;* and a gift to "all my grandchildren with the exception of one, viz., ——," was held to be a gift to the class not affected by the incomplete exception, *Illingworth* v. *Cooke*, 9 Ha. 37; 20 L. J. Ch. 512. The question is one as to the form of the gift. If the form is that of a class gift, the legatees take as a class and not as individuals, *Re Stanhope's Trusts*, 27 Be. 201; *Re Jackson*, 25 Ch. D. 162; 53 L. J. Ch. 180; *Kingsbury* v. *Walter*, [1901] A. C. 187; 70 L. J. Ch. 546; *Re Venn*, [1904] 2 Ch. 52; 73 L. J. Ch. 507. But see *Capes* v. *Dalton*, 86 L. T. 129; and *sub nomine Kekewich* v. *Barker*, 88 L. T. 130.

In ascertaining the persons to take under a gift to children as a class after a previous life estate, the Court adopts the rule of including as many objects of the gift as possible, consistently with the declared purpose of the testator, *Bouverie* v. *Bouverie*, 2 Ph. 349; 16 L. J. Ch. 411; *Jackson* v. *Dover*, 2 H. & M. 209. See also *Re Knowles*, 21 Ch. D. 806; 51 L. J. Ch. 851; *Kekewich* v. *Barker*, 88 L. T. 130.

As to the claims of a child *en ventre sa mère.*

It may be observed, that a child *en ventre sa mère* is regarded as a child *in esse*; and this construction obtains as well where the gift is to children generally, as where it is to children "living" at a prescribed period, *Clarke* v. *Blake*, 2 Ves. 672; or even to children "born" at such period, *Rawlins* v. *Rawlins*, 2 Cox, 425; *Whitelock* v. *Heddon*, 1 B. & P. 243; *Trower* v. *Butts*, 1 S. & S. 181; the word being evidently used in a general popular sense, without the particular design of distinguishing between children born and children procreated. To fall within the class, the child *en ventre* must be legitimately procreated, as well as legitimately born, *Re Corlass*, 1 Ch. D. 460; 45 L. J. Ch. 118. And a

child *en ventre* is treated as "living" or "born" only where such construction is necessary for the benefit of that child, *e.g.*, when the words are used in the description of the objects of a bequest, or to prevent a gift to it from being divested, *Pearce* v. *Carrington*, L. R. 8 Ch. 969; 42 L. J. Ch. 900; not when used merely for the purpose of ascertaining a period of time, *Blasson* v. *Blasson*, 2 D. J. & S. 665; 34 L. J. Ch. 18. But see *Re Burrows*, [1895] 2 Ch. 497; 65 L. J. Ch. 52; *Re Wilmer's Trusts*, [1903] 2 Ch. 411; 72 L. J. Ch. 670; *Villar* v. *Gilbey*, [1907] A. C. 139; 76 L. J. Ch. 339; *Re Salaman*, [1908] 1 Ch. 4; 77 L. J. Ch. 60. In *Re Burrows* there was a devise to A. for life, and upon her death to B. "for her absolute use and benefit, in case she has issue living at the death of A., but in case she has not issue then living," then over. At the time of the death of A., who survived the testator, B. was *enceinte*, and the following day was delivered of a living child. *Held*, that B. took absolutely under the devise. Of course, a fourth child, *en ventre* at the date of the will, was not entitled under a gift to "each of the three children of my niece," *Re Emery's Estate*, 3 Ch. D. 300.

If there is a gift "amongst all the children of A. B., and the said Y. Z.," the class is constituted of the children of A. B., together with Y. Z. personally, and not together with the children of Y. Z. For the latter interpretation, the gift should be "amongst all the children of A. B., and *of* the said Y. Z.," *Lugar* v. *Harman*, 1 Cox, 250; *Peacock* v. *Stockford*, 3 D. M. & G. 73; *Hawes* v. *Hawes*, 14 Ch. D. 614; *Re Featherstone's Trusts*, 22 Ch. D. 111; 52 L. J. Ch. 75. See also *Re Walbran*, [1906] 1 Ch. 64; 75 L. J. Ch. 105; *Re Harper*, [1914] 1 Ch. 70; 83 L. J. Ch. 157; *Re Whiston*, [1924] 1 Ch. 122; 93 L. J. Ch. 113.

See further, on gifts to children as a class, the notes to *Viner* v. *Francis*, 2 Cox, 190; 2 R. R. 29; in Tud. L. C. R. P.; and Jarm. Wills, ch. 42; and Hawkins, Constr. Wills, ch. 7; and note (*f*) to Prec. 24.

(*u*) See note (*d*), Prec. 9.

(*v*) As the Act of 36 Geo. 3, c. 52, has not subjected to legacy duty money which is to be appropriated in payment of the duty on legacies, a saving is effected by directing the duty to be paid out of the general estate. Thus, if in the case of an estate of £1,000 a specific legacy of £100, liable for legacy duty at 10 per cent., be bequeathed to A., and the residue (£900), similarly liable, to B., A. pays £10 legacy duty and actually receives £90, and B. pays £90 legacy duty and actually receives £810. But if A.'s legacy be given free of duty, A. pays no legacy duty and receives £100, and B. pays 10 per cent. on £890 (the sum left after paying A.'s legacy duty), *i.e.* £89 and receives £801, so that £99 instead of £100 has gone in legacy duty. In the case of annuities, it is often advisable to relieve the legatee from the burthen, which, being payable out of his income (by four equal annual instalments), is much felt. This observation, however, is not applicable to annuities which are directed to be purchased; in which case the Act of 36 Geo. 3, c. 52, makes the duty attach on the price of the annuity as a pecuniary legacy.

Suggestion as to legacy duty.

A gift of legacy duty on a specific or pecuniary legacy is a common pecuniary legacy, and, in the event of deficiency of the estate, abates along with other pecuniary legacies, *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19; 42 L. J. Ch. 809. And where a testator gave legacies free of duty *simpliciter*, and other legacies free of duty, with a direction that the duty should be paid out of his residuary estate; the legacies

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having been paid, the residue was insufficient to pay the duty; it was held that the gift of duty out of the residue failed *pro tanto*, and that the legatees, whose duty was to be borne by the residue, must themselves bear the duty to the extent to which the general personal estate was insufficient, *Wilson* v. *O'Leary*, L. R. 7 Ch. 448; 41 L. J. Ch. 342; *Re Turnbull*, [1905] 1 Ch. 726; 74 L. J. Ch. 438.

Exemption from legacy duty.

The following expressions exempt legatees from legacy duty. A direction to pay all legacies "without any deduction," *Barksdale* v. *Gilliat*, 1 Sw. 562; to pay annuities and legacies, "clear of property tax and all expenses whatsoever attending the same," *Courtoy* v. *Vincent*, T. & R. 433; "free from all expense," *Gosden* v. *Dotterill*, 1 M. & K. 56; 2 L. J. (N.S.) Ch. 15; "clear of all taxes and outgoings," *Louch* v. *Peters*, 1 M. & K. 489; 3 L. J. (N.S.) Ch. 167; "free from any charge or liability in respect thereof," *Warbrick* v. *Varley*, 30 Be. 241; and generally, a gift of a "clear" annuity of definite amount involves an exemption from duty, *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Wilks* v. *Groom*, 4 W. R. 697; 25 L. J. Ch. 724; *Re Currie*, 57 L. J. Ch. 743; but a direction to invest sufficient stock to produce a clear yearly income does not, *Banks* v. *Braithwaite*, 32 L. J. Ch. 35; see, however, *Re Coles' Will*, L. R. 8 Eq. 271; and *Re Saunders*, [1898] 1 Ch. 17; 67 L. J. Ch. 55. A gift to testator's employés of six months' "full" salary is not a gift free from legacy duty, *Re Marcus*, 56 L. J. Ch. 830. As to the duty on the proceeds of real estate devised upon trust for sale, see *White* v. *Lake*, L. R. 6 Eq. 188.

Estate duty.

As to what words will grant an exemption from estate duty, under the Finance Act, 1894, see *Re Parker-Jervis*, [1898] 2 Ch. 643; 67 L. J. Ch. 682; *Re Lewis*, [1900] 2 Ch. 176; 69 L. J. Ch. 406; *Re Leveridge*, [1901] 2 Ch. 830; 71 L. J. Ch. 23; *Re Dyet*, 87 L. T. 744; *Re Pimm*, [1904] 2 Ch. 345; 73 L. J. Ch. 627. And see *Re Waller*, [1916] 1 Ch. 153; 85 L. J. Ch. 188.

A direction in a will that the duty on legacies "herein" given shall be paid out of the testator's estate was held not to exempt legacies given by codicil, *Early* v. *Benbow*, 2 Col. 355; 15 L. J. Ch. 169; but see *Jauncey* v. *Att.-Gen.*, 3 Gif. 308; *Byne* v. *Currey*, 2 Cr. & M. 603; 3 L. J. (N.S.) Ex. 177; *Re Sealy*, 85 L. T. 451; and as to application of a codicil to words in a will, *Re Smith*, [1916] 2 Ch. 368; 85 L. J. Ch. 657. See also *Chatteris* v. *Young*, 2 Rus. 183; *Cooper* v. *Day*, 3 Mer. 154; *Re Trinder*, 56 S. J. 74; and note (*f*) to Prec. 9, *ante*, p. 175.

As to whether the words "free of all duty" will exonerate a gift from duties imposed by the Legislature after the testator's death, see *Re Snape*, [1915] 2 Ch. 179; 84 L. J. Ch. 803; *Re Palmer*, [1916] 2 Ch. 391; 85 L. J. Ch. 577; *Re Stoddart*, [1916] 2 Ch. 444; 86 L. J. Ch. 29; *Re Sarson*, [1925] 1 Ch. 31; 94 L. J. Ch. 155. And see as to the construction of various phrases intended to make gifts free of duty, *Re Brown*, [1916] W. N. 103; *Re Hatch*, [1916] W. N. 240; 86 L. J. Ch. 454; *Re Kennedy*, [1917] 1 Ch. 9; 86 L. J. Ch. 40; *Re Tinkler*, [1917] 1 Ch. 242; 86 L. J. Ch. 177; *Re D'Oyly*, [1917] 1 Ch. 556; 86 L. J. Ch. 373; *Re Eve*, [1917] 1 Ch. 562; 86 L. J. Ch. 396; *Re Parker*, [1917] W. N. 233; 86 L. J. Ch. 766; *Re Hampton*, [1918] W. N. 172; *Re Massey*, 90 L. J. Ch. 40.

For a general direction that gifts shall be free of duty, see Miscellaneous Forms, *post*, p. 365.

(*x*) See sect. 24 of the Wills Act, *ante*, and notes.

No. XII.

PREC. 12.

WILL *of a* MARRIED MAN, *providing for a Wife and his Son, an only Child* (*a*).—*Appointment of Executors and Guardians.—Bequest of Personal Effects to Wife.—Pecuniary Legacy to Testator's Mother for Life, then to his Sister absolutely.—Devise of Real Estates for Wife for Life.—Remainder for Son absolutely, but on his Death under Age, for Wife absolutely.—Bequest of Residuary Personal Estate to Trustees for Conversion and Investment.—Income to Wife for Life.—Capital to Son, with Executory Bequest on his Death under Age to Wife.—Power to postpone the Conversion of Personal Estate.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT [*names &c.*] to be executors and trustees of this my will and I APPOINT them to be the guardians of my son [*name*] during his minority (*f*). Appointment of trustees, executors and guardians.

3. I BEQUEATH to each of my executors and trustees hereinbefore named £—— individually and without reference to office [*compare Prec.* 8, *clause* 5] and to each of my friends [*names &c.*] £——. Legacies to executors and to friends.

4. I BEQUEATH to my said trustees the sum of £—— UPON TRUST that my trustees shall invest the same (*b*) and pay the annual income thereof to my mother [*name*] during her life and after her death transfer the principal fund to my sister [*name*] for her absolute use and I DECLARE that my trustees shall not have power during my mother's life to exercise the power to vary investments conferred by statute without her consent in writing. Legacies to trustees, in trust for testator's mother for life, then for his sister absolutely. Restriction upon power to vary the investment.

5. I DIRECT the aforesaid legacies to be paid or set aside at the end of three calendar months after my death and the lastly bequeathed legacy to carry interest at the rate of five per cent. per annum from my death until investment thereof and I direct that the interest or income derived from such legacy shall as well during the first year after my death as afterwards be paid to my mother during her life (*c*).

6. *Bequest of personal effects to wife as in Prec.* 8, *clause* 3 (*d*). Personal effects to wife absolutely.

7. I DEVISE and bequeath all the real estate of whatsoever tenure and wheresoever situate and all the chattels real to which I shall at my death be entitled either in possession reversion or Real estate for wife for life, remainder for testa-

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tor's son absolutely, but in the event of his death under age, for wife absolutely.

otherwise in trust for my said wife for her life without impeachment of waste and after her death in trust for my son and only child [*name*] absolutely but if my said son shall die whether in my lifetime or after my death under the age of twenty-one years (*e*) without leaving issue then I devise the same real estate and chattels real in trust for my said wife absolutely.

Residue of personal estate to trustees upon trust to get in and invest, &c.; —to permit wife to receive the income for her life; —capital to testator's son, but, in the event of his death under age, to wife.

8. I BEQUEATH the residue of my personal estate to my trustees hereinbefore named UPON TRUST that my trustees shall convert and get in the same and invest the moneys to arise therefrom AND UPON FURTHER TRUST that they shall permit and empower my wife to receive the annual income of the said moneys or the securities whereon the same shall be invested during her life And after her death as to the same moneys and securities and the annual income thenceforth to become due in respect thereof hold the same IN TRUST for my said son absolutely But if my said son shall die whether in my lifetime or after my decease under the age of twenty-one years without leaving issue then IN TRUST for my said wife absolutely.

Power to postpone the getting in of personal estate—the yearly proceeds to be deemed annual income.

9. I DECLARE that my trustees shall have a discretionary power to postpone for such period as to them shall seem expedient the conversion or getting in of any part of my residuary personal estate which shall at my death consist of shares in public companies or of stocks funds or securities of any description whatsoever but the outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the moneys and funds and securities aforesaid and the yearly proceeds thereof shall be deemed annual income for the purposes of such trusts.

10. *Investment clause.* See note (*b*) to Prec. 4 *and add to any investment clause* subject during my mother's life to the provision as to varying investments contained in clause 4 of this my will.

11. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 12.

(*a*) This Precedent should be adopted only in a case where the testator's wife is presumed to have passed the age of child-bearing. See note (*s*) to Prec. 11.

(*b*) See note (*b*), Prec. 4.

As to legacies carrying interest.

(*c*) If a legacy, whether pecuniary or of stock, is not paid at the expiration of a year from the testator's decease, or at such other period as the testator may have fixed for its payment, the legatee is entitled to interest at the rate of four per cent. (five per cent. was allowed on legacies in special circumstances, *Re Burley*, [1917] W. N. 115; and see *Re Bailey*, 61 S. J. 398; *Re Brinton*, 67 S. J. 704), from the end of the

year, or such other period respectively, and not before. See R. S. C., O. 55, r. 64. Thus the first payment of interest does not become due until two years after the death; and there is no difference in the case of a legacy to the testator's wife, *Stent* v. *Robinson*, 12 Ves. 461; *Re Whittaker*, 21 Ch. D. 657; 51 L. J. Ch. 737. This rule applies to similar legacies under the will of a married woman in exercise of a power of appointment, *Tatham* v. *Drummond*, 2 H. & M. 262. And if a testator directs his executors to purchase for A. £500 Three per Cent. Consols, A. is not entitled to call for a transfer until the expiration of a year after the testator's decease, and, therefore, cannot claim the dividends for the interval, *Pearson* v. *Pearson*, 1 Sch. & Lef. 10. But if the legacy were specific, as where a testator bequeaths a given portion of stock then standing in his name, the legatee would be entitled to the actual produce of the fund from the testator's decease, just as he would be entitled to the rents of a house specially devised; and see *Dundas* v. *Wolfe Murray*, 1 H. & M. 425; 32 L. J. Ch. 151. Where legacies were directed to be paid within four years after testator's decease, interest was payable, as from the expiration of one year after testator's death, on such as remained unpaid after the year, *Re Olive*, 53 L. J. Ch. 525; distinguishing *Thomas* v. *Att.-Gen.*, 2 Y. & C. Ex. 525. A legacy to the testator's wife, in lieu of dower and freebench, carried interest only from the expiration of a year from the testator's death, *Re Bignold*, 45 Ch. D. 496; 59 L. J. Ch. 737. It is observable, too, that the rule which entitles a pecuniary legatee to interest only from the end of a year, applies as well to legacies which are to be invested for the benefit of a legatee for life as to those which are bequeathed to the legatee absolutely. "If an annuity is given, the first payment is paid at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy, and till the legacy is payable, there is no fund to produce interest": *per* Lord Eldon, in *Gibson* v. *Bott*, 7 Ves. 89. But whether, if a sum of money is directed to be invested to produce an annuity, it is to be considered as a legacy payable at the end of the year, or as an annuity payable from the death, was in *Gibson* v. *Bott*, 7 Ves. 97, considered doubtful. See, however, *Re Friend*, 78 L. T. 222. A consequence of the doctrine that a legacy carries interest from the arrival of the time of payment, and not before, obviously is, that interest does not run on contingent legacies, as the contingency necessarily postpones the payment, *Descrambes* v. *Tomkins*, 1 Cox, 133; *Tyrrell* v. *Tyrrell*, 4 Ves. 1; *Re Inman*, [1893] 3 Ch. 518; *Re White*, 101 L. T. 780; but where demonstrative legacies are payable out of a reversionary interest, interest is payable on the legacies from the expiration of the first year from the testator's death, *Re Walford*, [1912] 1 Ch. 219; [1912] A. C. 658; 81 L. J. Ch. 828. A different doctrine from that above mentioned of Lord Eldon prevails with respect to a bequest of the residue of personalty for life with remainder over; contrary decisions will be found in the reports, but the preponderance of the latter cases was in favour of the claim of the residuary legatee for life to receive the income, in some shape or other, from the death of the testator; and the question was at length set at rest by a decision of the House of Lords, that the life tenant of the residue takes the whole income thereof during the first year after the testator's death, *Macpherson* v. *Macpherson*, 1 Macq. 243; see also *Johnston* v. *Moore*, 27 L. J. Ch. 453. Where maintenance during the minority of the legatee is given by a testator who is not parent or *in*

Contingent legacy.

Interest on legacies.

Gift of residue for life, with gift over.

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loco parentis to the legatee, out of a contingent legacy, the legacy will carry interest, but not where maintenance is given from some other source, *Re West*, [1913] 2 Ch. 345; 82 L. J. Ch. 488.

Legacy payable out of land.

Where a sum of money is payable primarily out of rents or by mortgage of land, which is not subjected to the testator's debts, so that the payment is not involved in or dependent upon the general administration of the personal estate, the legacy carries interest from the death of the testator, *Spurway* v. *Glynn*, 9 Ves. 483; *Shirt* v. *Westby*, 16 Ves. 393; *Davies* v. *Davies*, Dan. 84; see also *Pearson* v. *Pearson*, 1 Sch. & Lef. 10; *Earl of Miltown* v. *Trench*, 4 C. & F. 276. But where land is devised upon trust for sale, and out of the proceeds of sale to pay legacies, interest is payable only from the expiration of a year from the death, *Turner* v. *Buck*, L. R. 18 Eq. 301; 43 L. J. Ch. 583. This case was characterised by Kay, J., as "a unique decision," in the course of his judgment in *Re Waters*, 42 Ch. D. 517; 58 L. J. Ch. 750.

The old doctrine which made the title to interest depend on the fact whether the fund out of which the legacy is payable does or does not yield immediate profit seems to be exploded, see *Gibson* v. *Bott*, 7 Ves. 89, 97. And where the residuary personal estate of a testator comprised a bond debt, and, the debtor being insolvent, part only of the principal and interest was recovered many years subsequently to the testator's death, it was held that the tenant for life of the residue, as against those in remainder, was entitled not to the sum which had actually been recovered in respect of interest, but only to the interest at four per cent. on the sum which the bond would have realised if the testator's estate had been administered at the end of a year after the debtor's death, *Turner* v. *Newport*, 2 Ph. 14. Where a legacy is given in satisfaction of a debt, interest is payable from the testator's death, *Clark* v. *Sewell*, 3 Atk. 96. As to the interest payable where a testator directs the payment of the debts of another person previously deceased, see *Askew* v. *Thompson*, 4 K. & J. 620. And, if a legacy is directed to be paid at a future time, as to A. on attaining twenty-three, and A. attains twenty-three in the testator's lifetime, the legacy will be an ordinary immediate legacy and carry interest from the expiration of the testator's death, *Re Palfreeman*, [1914] 1 Ch. 877; 83 L. J. Ch. 702.

Interest on legacy in satisfaction of a debt.

In *Noel* v. *Jones*, 16 Sim. 309; 17 L. J. Ch. 470, a bequest to trustees upon trust to pay and apply £800 in and upon the education of the godson of the testatrix was held to be an absolute gift to the godson, bearing interest from the expiration of one year from the death of the testatrix.

Interest on legacies to children.

Legacies to infants to whom the testator stands *in loco parentis* are the subject of a peculiar doctrine respecting interest, arising from the moral claim which such objects are considered as possessing to an immediate provision. Such legacies, therefore, if the legatees are not otherwise provided for, will often carry interest before the prescribed time of payment, and even while contingent. Thus, if a testator bequeaths a pecuniary legacy, or the residue of his estate, to his children on their attaining majority, or to such children as shall attain majority, the children, though under twenty-one, will (subject to the qualification presently noticed) be entitled to the interest for maintenance from the day of the testator's decease, *Harvey* v. *Harvey*, 2 P. W. 21; *Heath* v. *Perry*, 3 Atk. 102; *Incledon* v. *Northcote*, 3 Atk. 438; or, in case of a posthumous child, from the birth, *Rawlins* v. *Rawlins*, 2 Cox, 425. As to the effect of express direction to accumulate the income arising from

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the residue of the testator's estate upon the right of the infant legatee to claim maintenance out of the interest, see *Mole* v. *Mole*, 1 Dick. 310; *Kime* v. *Welfitt*, 3 Sim. 533. And even where the testator expressly provides for maintenance during part of the minority, this does not prevent the allowance of interest for the remaining period, *Chambers* v. *Goldwin*, 11 Ves. 1; *Martin* v. *Martin*, L. R. 1 Eq. 369; 35 L. J. Ch. 281. A legacy by a parent to an infant carries interest from the death of the testator notwithstanding that the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of residue given to him equally with the other children, *Re Moody*, [1895] 1 Ch. 101; 64 L. J. Ch. 174. It is otherwise if the legacy is contingent upon an event having no reference to the legatee's infancy, *Re Abrahams*, [1911] 1 Ch. 108. And see *Re Stewart*, [1913] W. N. 183. The greatest extension, however, of the doctrine in favour of provisions for maintenance is exemplified by those cases in which an express allowance made by the testator has been increased, *Aynsworth* v. *Pratchett*, 13 Ves. 321; *Stretch* v. *Watkins*, 1 Mad. 253; *Josselyn* v. *Josselyn*, 9 Sim. 63; *Allen* v. *Coster*, 1 Be. 202; 9 L. J. Ch. 131; but in order to warrant such an augmentation, the inadequacy of the testator's allowance must be clearly made out, *Hearle* v. *Greenbank*, 3 Atk. 716; *Long* v. *Long*, 3 Ves. 286, n.; and the general rule undoubtedly is, that where the testator has otherwise provided for the maintenance of his infant children, the claim to interest before the period appointed for payment of the legacy cannot be supported, *Wynch* v. *Wynch*, 1 Cox, 433; *Donovan* v. *Needham*, 9 Be. 164; 15 L. J. Ch. 193. Where the gift has proceeded from the father of the infant, or a person *in loco parentis* (see *Re Eyre*, [1917] 1 Ch. 351; 86 L. J. Ch. 257), and the subject-matter is a residuary personal estate, maintenance will be allowed to the members of a class, even when their interests are contingent, if the chances of each ultimately becoming entitled are equal, and no other person is interested, *Fairman* v. *Green*, 10 Ves. 45; *Ex parte Kebble*, 11 Ves. 604; *Turner* v. *Turner*, 4 Sim. 430; *Errat* v. *Barlow*, 14 Ves. 202; *Cannings* v. *Flower*, 7 Sim. 523. See also *Re Colgan*, 19 Ch. D. 305; 51 L. J. Ch. 180. But where the infant's interest in real estate, *Green* v. *Ekins*, 2 Atk. 473; *Bullock* v. *Stones*, 2 Ves. S. 521; or in a particular trust fund, *Leake* v. *Robinson*, 2 Mer. 363, 384. was contingent, the intermediate income (until the happening of the contingency) formerly belonged to the heir or residuary devisee, or to the next of kin or residuary legatee, as the case may be (see *ante*, note (*g*) to Prec. 5); and such income could not be applied for the infant's benefit unless the application was directed or sanctioned by the will, see *Re Richards*, L. R. 8 Eq. 119, and *Re Crane*, [1908] 1 Ch. 379; 77 L. J. Ch. 212. But see *Re Ramsey*, [1917] 2 Ch. 64; 86 L. J. Ch. 514. The gift for the infant's benefit must proceed from its parent or from a person who has put himself in the place of its parent, for maintenance (as a rule) would be refused out of a contingent interest, or where the fund is limited over, if the gift proceeds from a stranger, or even from a grandfather to his grandchild, *Errington* v. *Chapman*, 12 Ves. 20; *Crickett* v. *Dolby*, 3 Ves. 10; but see *Greenwell* v. *Greenwell*, 5 Ves. 194; *Cavendish* v. *Mercer*, 5 Ves. 195 *n*, 197 *n*; or where the infant is a natural child, if not recognised and adopted by its father, *Lowndes* v. *Lowndes*, 15 Ves. 301. See, however, the Trustee Act, 1925, s. 31 (*ante*, note (*e*) to Prec. 7), as to maintenance of infants out of the interest on contingent legacies, unless a contrary intention is expressed in the will.

Interest on legacies to infants, for maintenance.

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Adult legatees.

The doctrine which entitles children to interest by way of maintenance did not extend to adults, *Lowndes* v. *Lowndes*, 15 Ves. 301; see also *Raven* v. *Waite*, 1 Sw. 553, 558; *Wall* v. *Wall*, 15 Sim. 513; 16 L. J. Ch. 305; nor, in general, to an infant whose parent was living, as the testator, in regard to such an object, did not stand *in loco parentis*, *Lomax* v. *Lomax*, 11 Ves. 48; *Errington* v. *Chapman*, 12 Ves. 20, unless there was distinct evidence of an intention to assume the parental office in regard to providing for the infant, *Powys* v. *Mansfield*, 3 M. & C. 359; 7 L. J. (N.S.) Ch. 9; nor, it is presumed, would it have applied where the infant is married. It has often been a question whether the title to maintenance, under an express provision, ceased on marriage, *Chambers* v. *Goldwin*, 11 Ves. 1; *Bowden* v. *Laing*, 14 Sim. 113; *Conolly* v. *Farrell*, 8 Be. 347; 14 L. J. (N.S.) Ch. 189; see also *Staniland* v. *Staniland*, 34 Be. 536; *Scott* v. *Key*, 35 Be. 291; *Re Booth*, [1894] 2 Ch. 282. As to the applicability of the general doctrine, discussed in this note, to illegitimate children, see *Beckford* v. *Tobin*, 1 Ves. S. 308; *Raven* v. *Waite*, 1 Sw. 553; *Newman* v. *Bateson*, 3 Sw. 689; *Dowling* v. *Tyrell*, 2 R. & M. 343; *Rogers* v. *Soutten*, 2 Ke. 598; *Hill* v. *Hill*, 3 V. & B. 183.

Illegitimate children.

See also, as to the time of payment of legacies and interest, the notes to *Ashburner* v. *Macguire*, in 2 Wh. & Tud. L. C. Eq.

In the case of wills coming into operation after 1925, a contingent specific bequest and a contingent specific or residuary devise will carry such part of the intermediate income as is not otherwise expressly disposed of (Law of Property Act, 1925, s. 175) and such income will be applicable for maintenances under sect. 31 of the Trustee Act, 1925.

(*d*) See note (*a*) to Prec. 8.

Mode of computing age.

Fractions of a day not generally recognised by the law.

(*e*) The day of a person's birth is included in computing his age for testamentary purposes; which, coupled with the fact that the law does not generally recognise fractions of a day (*fractionem diei non recipit lex*), leads to the singular result that a person may, according to legal computation, attain his majority nearly two days before he has actually completed twenty-one years. Thus, suppose A. to be born (however short a time) before midnight on November 5, 1833, that day is to be included; if he lived (however short a time) beyond midnight of November 3, 1854, so as to have entered upon November 4, the latter day must also be counted, fractions not being recognised; and thus A. legally attained his majority, and could execute a valid will, at the first instant of November 4, 1854, although, computing the time *de momento in momentum*, nearly forty-eight hours would still be wanting to complete twenty-one years from the instant of his birth, see the *Anonymous Case*, cited by Holt, L.C.J., 1 Ld. Raym. 480, and *Re Shurey*, [1918] 1 Ch. 263; 87 L. J. Ch. 245. And see note (*a*) to sect. 7 of the Wills Act, *ante*.

A person attains "his twenty-fifth year" when he becomes twenty-four years old, *Grant* v. *Grant*, 4 Y. & C. Ex. 256; 10 L. J. (N.S.) Ex. Eq. 5. To recur to the former example, A. attained his twenty-fifth year, in legal computation, at the first instant of November 4, 1857.

If an act is required to be done within six calendar months after the death of testator, the computation is exclusive of the day of the death; so that if the death takes place on January 12, the last day for performance of the act is July 12, *Lester* v. *Garland*, 15 Ves. 248; *Gorst* v. *Lowndes*, 11 Sim. 434; 10 L. J. Ch. 161.

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The law, however, does not, for all purposes, reject fractions of a day. Thus, several deeds executed on the same day take effect in the order of their delivery, and when they relate to the same subject-matter the Court will inquire which was executed first, *Gartside* v. *Silkstone, &c. Co.*, 21 Ch. D. 762; 51 L. J. Ch. 828.

Fractions of a day recognised in some cases.

(*f*) Previously to 4 & 5 Ph. & Mar. c. 8 (repealed by 9 Geo. 4, c. 31), a man had no power to appoint by his will guardians of his children. But the 2nd section of that Act, by construction, enabled a father to appoint, by his last will and testament, or otherwise, guardians for his female children under the age of sixteen. This power was extended by 12 Car. 2, c. 24 (14 & 15 Car. 2, c. 19, Ireland), the 8th section of which authorised a father, whether of age or not, to dispose, by deed or by his last will and testament, of the custody and tuition of any of his children under the age of twenty-one years and unmarried at the time of his death, during the time such child or children should remain under the age of twenty-one years, or for any less time; and the Act sanctions his giving authority to a surviving guardian to nominate a guardian in the place of one who has died, *In b. Parnell*, L. R. 2 P. & D. 379; 41 L. J. P. 35. The Wills Act expressly includes within its scope (*ante*, p. 1) "a disposition by will and testament or devise of the custody and tuition of any child" by virtue of the above statute, and deprives a father who is under twenty-one (sect. 7, *ante*) of the power of appointing by will guardians of his children; see, however, the note to sect. 11 for the power now conferred upon testators under that section. His power of appointing by deed, however, still remains. The stat. 12 Car. 2, c. 24, does not extend to illegitimate children, *Sleeman* v. *Wilson*, L. R. 13 Eq. 36, although the Court will usually appoint the person named by the reputed father to be the guardian of such children, *Ward* v. *St. Paul*, 2 Br. C. 583; *Peckham* v. *Peckham*, 2 Cox. 46; *Chatteris* v. *Young*, 1 J. & W. 106. See the statute quoted in Appendix I.

As to appointment of guardians.

4 & 5 P. & M. c. 8.

12 Car. 2, c. 24.

1 Vict. c. 26.

Illegitimate.

The power of appointing guardians does not extend to infant children who are married at the father's death; yet, if then unmarried, the guardianship is not determined by the subsequent marriage of sons, *Earl of Shaftesbury's Case* cited 3 Atk. 625; but it is by the subsequent marriage of daughters, *Mendes* v. *Mendes*, 1 Ves. S. 91; *Roach* v. *Garvan*, *ib.* 160.

Married children.

As to what words in a will are sufficient to appoint a guardian, see *Miller* v. *Harris*, 14 Sim. 540; *Re G.*, [1892] 1 Ch. 292; 61 L. J. Ch. 490; and as to revocation of an appointment of guardians see *Ex parte Lord Ilchester*, 7 Ves. 348.

By the Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45) on the death of the father or mother of an infant, the other parent becomes guardian, either alone when no guardian has been appointed by the other, or jointly with any guardian appointed by the other. The parent of any infant may by deed or will appoint any person to be guardian of such infant after his or her death, and where guardians are appointed by both parents they are to act jointly. By this Act sects. 2 and 3 of the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27) are repealed, and that Act is in other ways amended.

Guardianship of Infants Act, 1925.

The Act of 1886 did not affect a father's right to decide the religious education of his child, or the duty of a guardian to educate a child in the father's religious faith, *Re Scanlan*, 40 Ch. D. 200; 57 L. J. Ch. 718. But the Court could depart from the father's wishes in the child's

Religion.

NOTES TO PREC. 12.

welfare, *Re Newton*, [1896] 1 Ch. 740; 65 L. J. Ch. 641; *Re W.*, [1907] 2 Ch. 557. Under sect. 1 of the Guardianship of Infants Act, 1925, the welfare of the infant is the first and paramount consideration in questions of custody, upbringing, or administration of property.

Probate.

It is not necessary to prove a testamentary appointment of guardians in the Probate Court, but such appointment is to be proved in the same manner as a deed, *Gilliat* v. *Gilliat*, 3 Phillim. 222; *Lady Chester's Case*, 1 Ven. 207; *Re Morton*, 3 Sw. & Tr. 422; 33 L. J. P. 87.

Office survives.

Where several testamentary guardians are appointed, the right of guardianship will vest in the survivors or survivor, although the will contains no words declaring that it shall survive, *Eyre* v. *Countess of Shaftesbury*, 2 P. W. 103; but *contra*, if the guardians are appointed by the Court, *Bradshaw* v. *Bradshaw*, 1 Russ. 528; *Hall* v. *Jones*, 2 Sim. 41.

See as to the powers of guardians, 51 S. J. 5.

PREC. 13.

No. XIII.

WILL *of a* MARRIED MAN, *providing for a Wife and Younger Children by Name; the Eldest Son having been provided for.—Rent-Charge for Wife, reducible on Marriage.—Residue (Real and Personal) on Trust for Sale and Division amongst Younger Children, with Executory Trusts between them and the Eldest Son* (*a*).

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Appointment of trustees, executors and guardians.

2. I APPOINT my friends [*names* &c.] to be executors and trustees of this my will and trustees thereof for the purposes of the Settled Land Act 1925 and I APPOINT them to be guardians of my children during their respective minorities (*b*).

Personal effects to wife.

3. *Bequest of personal effects to wife as in Prec.* 8, *clause* 3.

Immediate legacy.

4. *Immediate legacy to wife as in Prec.* 6, *clause* 3.

Pecuniary legacy to eldest son.

5. I BEQUEATH to my eldest son [*name*] (for whom I have already provided) the sum of £—— only to be paid to him at the end of —— calendar months next after my death.

Rent-charge to wife, reducible on marriage.

6. I DEVISE to my said wife a yearly rent-charge of £—— for her life if she shall so long continue my widow but if she shall marry again then a yearly rent-charge of £—— only for the remainder of her life the said yearly rent-charge of £—— or £—— (as the case may be) to be charged upon and issuing out of all the freehold hereditaments [*or* the freehold hereditaments situate in the county of ——] to which I shall be entitled at my death and to be payable half-yearly the first payment of the said yearly rent-charge of £—— to be made at the end of six

calendar months from my death if my said wife shall be then living and my widow and the first payment of the said yearly rent-charge of £—— to be made at the end of six calendar months from the second marriage of my said wife (*c*) but so that during any coverture she shall not have power to anticipate such rent-charge.

Real estate and residue of personal estate among younger children, with executory limitations between them and the eldest son.

7. I DEVISE AND BEQUEATH all the real estate and the residue of the personal estate to which I shall be entitled at my death (but as to my freehold hereditaments so charged as aforesaid subject to such of the said rent-charges as shall for the time being be payable) unto my trustees hereinbefore named upon trust that my trustees shall sell the same and divide the net proceeds of sale amongst my younger children [*names*] in equal shares But if any of them shall die in my lifetime under the age of twenty-one years without leaving issue living at my decease or shall survive me but die under the age of twenty-one years without leaving issue Then I direct that the share or shares as well accruing as original of such of them as shall so die shall be held in trust for my said eldest son and for the others or other of my said younger children absolutely in equal shares.

Power to appoint trustees.

8. I DECLARE that a new trustee or new trustees of my will may from time to time be appointed by my said wife during her widowhood and subject as aforesaid in the manner prescribed by law and if my wife and the said [*names of above trustees*] shall all have predeceased me I declare that it shall be lawful for [*name*] or his executors or administrators for the time being to appoint within six calendar months (*d*) after my death not less than two fit persons as trustees of this my will.

9. *Investment clause.* See note (*b*) to Prec. 4.

10. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 13.

(*a*) This precedent disposes of the testator's property amongst his children *nominatim*. In case of the death of any child in the testator's lifetime leaving issue, any of whom survive the testator, the ownership of such deceased child's share would be governed by the provisions of 1 Vict. c. 26, s. 33 (*ante*, p. 67). But the will does not provide for after-born children, or for the possible case of the testator's wife being pregnant at the time of his death. This form, like the previous one, ought not to be adopted except in the case of a testator whose wife is presumed to have passed the age of child-bearing.

(*b*) See note (*a*) to Prec. 5, and note (*f*) to Prec. 12.

(*c*) Powers of distress and entry for securing the rent-charge are now supplied by sect. 121 of the Law of Property Act, 1925. A rent-charge for life can, after 1925, only take effect in equity: Law of Property Act,

NOTES TO PREC. 13.

1925, s. 1. The equitable interest can be overreached by a conveyance of the legal estate under sect. 2 of the Law of Property Act, 1925.

(*d*) In all wills coming into operation after 1925 "month" will mean "calendar month": Law of Property Act, 1925, s. 61. But until this becomes generally known, it will be sometimes advisable in wills to show what is meant.

PREC. 14.

No. XIV.

WILL *of a* MARRIED MAN, *providing for a Wife and Adult Children.—Bequest to Wife of Wines, &c., and the Use of Furniture.—Real Estate and Residue of Personal Estate vested in Trustees for Sale and Conversion; Income to Wife for Life.—Legacy out of Capital to one Child, and Surplus among the other Children.—Trustees not to sell real Estate in Wife's Lifetime without her Consent, and to be at liberty to postpone the Conversion of Personalty.—Power to appoint Trustees.*

THIS IS THE LAST WILL of me [*testator's name residence and quality.*]

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT [*names &c.*] to be executors and trustees of this my will.

Bequest of wines, &c., to wife.

3. I BEQUEATH the wines liquors fuel and other consumable household stores and provisions and the linen china and glass of which I shall die possessed to my wife [*name*] absolutely.

Bequest of furniture, &c., to wife for life, then to fall into the residue;

4. I BEQUEATH to my said wife the use and enjoyment during her life of the household furniture (*a*) and effects not hereinbefore bequeathed and the plate books pictures and prints of which I shall die possessed she keeping the same properly insured against fire and in good repair and preservation reasonable wear and tear excepted And after her death I DIRECT the same articles to be disposed of as part of the residue of my personal estate [*or* I BEQUEATH the same to my four children [*names*] to be divided between them as nearly as may be in equal shares and if any dispute (*b*) shall arise concerning the division thereof then such division shall be made by my trustees whose determination shall be final] AND I DIRECT my trustees to cause an inventory to be taken of the same articles before the delivery thereof to my said wife and two copies of such inventory to be signed by my said wife of which copies one shall be delivered to her and the other be kept by my executors (*c*).

—[*or*, to be divided between testator's children.]

Inventory of furniture, &c., to be taken.

Real and residuary personal

5. I DEVISE all the real estate to which I shall be entitled at my death and I bequeath the residue of the personal estate to

PREC. 14.

which I shall be then entitled to my trustees hereinbefore named UPON TRUST that my trustees shall sell my real and leasehold estates and convert and get in my other residuary personal estate and invest the moneys to arise from such real and leasehold and residuary personal estate in manner hereinafter authorised and I DECLARE that during the life of my said wife the power to vary investments shall be exercisable by my trustees only with her consent in writing AND UPON FURTHER TRUST that my trustees shall permit and empower my wife to receive the annual income of the said moneys or the stocks funds and securities whereon the same shall be invested during her life And after her death as to the same money stocks funds and securities and the annual income thenceforth to become due for the same UPON TRUST that my trustees shall pay thereout to my [*said*] son [*name*] the sum of £—— which sum shall be absolutely vested in him on my death (*d*) and shall carry interest after the rate of five per cent. per annum from the death of my said wife until payment thereof And subject to the payment of the same sum and interest upon trust that my trustees shall hold the same IN TRUST for my other children [*names*] to be divided equally among them the shares of such children to be absolutely vested in them on my death (*e*).

estate to trustees, upon trust to sell, get in and invest.

Restriction on power to vary investments;

—to permit wife to receive the income for life;

—after her death to pay legacy to one of testator's children, with interest from her death;

—to divide the surplus between the other children.

6. I DECLARE that no sale of my real estate or any part thereof shall be made in the lifetime of my said wife without her previous consent in writing and that my trustees shall have a discretionary power to postpone for such period as to them shall seem expedient the conversion or getting in of any part of my residuary personal estate which shall at my death consist of stocks funds shares or securities of any description whatever but the unsold real estate and outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the moneys stocks funds and securities aforesaid and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trusts and such real estate shall be transmissible as personal estate under the ultimate trust hereinbefore contained (*f*).

Trustees prohibited from selling real estate in wife's lifetime without her consent, and empowered to postpone the conversion of personal estate—unsold real estate to be deemed personal.

7. I DECLARE that a new trustee or new trustees of my will may from time to time be appointed by my said wife during her life and that if my said wife and the said [*names of above trustees*] all predecease me it shall be lawful for [*name*] or his executors or administrators for the time being to appoint within six calendar months after my death not less than two fit persons as trustees of my will (*g*).

Power to appoint new trustees.

8. *Investment clause.* See note (*b*) to Prec. 4, *and add to the investment clause* subject during the life of my said wife to

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the provision as to varying investments contained in clause 5 of this my will.

9. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 14.

(*a*) See note (*a*) to Prec. 8.

Executor's discretion; distribution of specific chattels.

(*b*) Where specific chattels are given to a number of persons in common, it seems necessary, or at all events desirable, to give to some person or persons a power to divide or distribute them, or to sell the whole and divide the proceeds. In the absence of such a power, what is to be done with (say) a collection of paintings bequeathed to six persons, each person taking an undivided sixth share in each picture, and the six being unable to agree to (or any one of them refusing to concur in) either a division or sale of the whole?

As to security required from legatees for life, or conditional legatees.

(*c*) This direction is in accordance with the rule of equity, by virtue of which the interference of the Court on the part of an ulterior legatee of chattels is at present restricted to the requisition of an inventory from the legatee for life. To support the demand of security, formerly required, a special case of actual danger must now be made out, *Foley* v. *Burnell*, 1 Br. C. 279; *Conduitt* v. *Soane*, 1 Col. 285; 13 L. J. Ch. 390. Indeed, even where a pecuniary legacy is made liable to be defeated by a subsequent contingency, the legatee (the time of payment having arrived) is entitled to receive it without giving security, as the Court will not exact from a legatee what the testator has not required. Thus, where a testator bequeathed £1,000 to A., but on condition that, if she succeeded to a particular estate, by the determination of a certain estate tail then subsisting in B., the legacy should be void; it was held, that A. was entitled to be paid the legacy in the lifetime of B. without security, *Fawkes* v. *Gray*, 18 Ves. 131. See also *Griffiths* v. *Smith*, 1 Ves. 97.

Express direction as to vesting.

(*d*) Having regard to the established rules of construction respecting the vesting of estates and interests, this declaration may appear superfluous; but in preparing legal instruments in general, and more especially wills, some concession may be usefully made to popular notions; for it seems desirable, if possible, that wills should be so framed as to disclose the testator's intention to the most unlearned reader of the document. Considering how often the vesting of legacies is a subject of dispute, scarcely any degree of explicitness on the point can be deemed excessive.

(*e*) The children being named and not described as a class, the provisions of sect. 33 of the Wills Act will be applicable in case any child predecease the testator. See Wills Act, s. 33, *ante*, p. 67.

Propriety of an express authority to suspend the conversion.

(*f*) A declaration to this effect should be inserted where a discretionary power is lodged in trustees or others to suspend the conversion of the property, as otherwise the question occurs, whether the property is to be considered, for the purposes of transmission, as converted, until it actually becomes so. Where the direction to sell and convert forthwith is absolute and imperative, the doctrine that the property, in contemplation of equity, becomes immediately impressed with the qualities belonging to its destined character is so well settled and known (see *Fletcher* v. *Ashburner*, 1 Br. C. 497), that a clause declaratory of the testator's intention on the point is less important. But a mere declaration will not cause conversion unless there is an imperative trust for sale, *Re*

NOTES TO PREC. 14.

Walker, [1908] 2 Ch. 705, 712; 77 L. J. Ch. 755; *Re Twopenny's Settlement*, [1924] 1 Ch. 522; 93 L. J. Ch. 323, and a future trust for sale which never arises does not cause a conversion, *Re Hopkinson*, [1922] 1 Ch. 65. Under a trust for sale which was properly postponed the person entitled to the income of the proceeds of sale was entitled to the rents and profits of real estate until sale, *Re Searle*, [1900] 2 Ch. 829; 69 L. J. Ch. 712; *Re Oliver*, [1908] 2 Ch. 74; 77 L. J. Ch. 547. A power to postpone sale is implied, after 1925, in the case of every trust for sale of land under sect. 25 of the Law of Property Act, 1925, and the rents and profits will be applicable until sale as directed by sect. 28 (2) of that Act.

Failure of purposes of conversion.

Where a testator directed the sale of realty for purposes which wholly failed, his heir took as realty; but if the failure was partial only, the heir took the surplus of the conversion fund as personalty, *Smith* v. *Claxton*, 4 Mad. 484; *Bagster* v. *Fackerell*, 26 Be. 469; *Wilson* v. *Coles*, 28 Be. 215; *Jessopp* v. *Watson*, 1 M. & K. 665; 2 L. J. Ch. 197; *Att.-Gen.* v. *Lomas*, L. R. 9 Ex. 29; 43 L. J. Ex. 32; *Re Richerson*, [1892] 1 Ch. 379; 61 L. J. Ch. 202. The distribution of estates on intestacies after 1925, in the manner provided by sects. 33 and 46 of the Administration of Estates Act, 1925, will render the doctrine of conversion less important in years to come.

See the doctrine of conversion discussed in the notes to *Fletcher* v. *Ashburner*, 1 Wh. & Tud. L. C. Eq.; and Jarm. Wills, ch. 22.

(*g*) See note (*f*) to Prec. 6.

No. XV.

PREC. 15.

WILL *of a* MARRIED MAN *disposing of Personal Property in favour of his Wife and Children.—Personal Effects, &c., bequeathed to Wife absolutely; Income of Residue to Wife during Widowhood; Capital to Children and Issue living at her Death or Marriage, per Stirpes; Husbands and Widows of deceased Children to participate.—Directions as to investment of Residue, with Power to continue Investments, and special Provisions as to what shall be deemed Income.—Power to appoint Trustees, &c.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Appointment of executors and guardians.

2. I APPOINT [*names &c.*] to be trustees and executors of my will and I APPOINT them to be guardians of my infant children after the death of my wife [*name*] and if she shall marry again to be guardians also jointly with her (*a*).

Personal effects to wife.

3. *Bequest of personal effects to wife as in Prec.* 8, *clause* 3.

Immediate legacy to wife.

4. *Immediate legacy to wife as in Prec.* 6, *clause* 3.

PREC. 15.

Pecuniary legacy to brother.

Income of residue to wife during widowhood;

—capital to testator's children and issue living at her death or marriage *per stirpes;*

—widowers and widows of deceased children to participate;

5. I BEQUEATH to my brother [*name*] the sum of £—— to be paid to him within six calendar months after my death and I direct that the same legacy shall not be deemed a satisfaction of the debt owing from me to him (*b*) I BEQUEATH the income of the residue of the personal estate of which I shall die possessed to my wife for her life if she shall continue my widow And on her death or marriage the capital with the future income of such residue to such children of mine then living and such issue then living of my children then dead as shall either before or after the death or marriage of my wife attain the age of twenty-one years or marry [*or* as being males shall either before or after the death or marriage of my wife attain the age of twenty-one years or being females shall either before or after the same period attain that age or be married] as tenants in common in a course of distribution according to the stocks and not to the number of individual objects and so that the issue of a deceased child may take as tenants in common by way of substitution the share only which their parent would if living have taken But the widower or widow (if any) living at the period aforesaid of every deceased child of mine in the event of there not being any issue of the same child then living shall be substituted for the same child as an object of the preceding trust or in the event of there being any such issue then living shall take a life interest in the income of the share [*or* be entitled to one (*third*) part of the share] which the deceased child would if living have taken and also on failure eventually of the interest if contingent of the issue in the capital of the same share [*or* in the residue of the same share] be substituted for the deceased child as an object of the preceding trust.

Power to continue investments at interest—direction to get in and invest;

—[*or*, discretionary power during widowhood of wife, and direction after death or marriage, to convert personal estate—trustees authorised to permit wife

6. I EMPOWER my trustees to permit my personal estate invested at my decease in or upon any stocks funds shares or securities whatsoever yielding income to continue in the same state of investment as long as they shall think fit but subject to such discretionary power I direct them to get in my residuary personal estate not consisting of authorised investments and to invest the proceeds in their names (*c*) [*Or* I EMPOWER my trustees at any time or times during the widowhood of my wife if they shall think fit so to do and I direct them after the death or marriage of my widow to convert or get in such part or parts of my residuary personal estate as shall not consist of authorised investments and to invest in their names the moneys to arise from the personal estate so converted or gotten in which moneys and the investments thereof shall be subject to the trust hereinbefore declared concerning my residuary personal estate AND I DECLARE that my trustees shall not incur any responsibility by

permitting so much of my residuary personal estate as shall at my death be constituted of lifehold or leasehold interests or other determinable property (*d*) or be invested in or upon any stocks funds securities or other pecuniary investments whatsoever whether foreign or British real or personal permanent or determinable to remain wholly or in part so invested or by permitting my wife to receive the whole amount of the yearly produce thereof during her widowhood or by permitting so much of my residuary personal estate as shall not be so constituted or invested to remain unconverted or by permitting my wife to have the use or enjoyment thereof during her widowhood]. [to receive the whole income of residue].

7. I DECLARE that during the widowhood of my wife my trustees shall not exercise the power of varying investments or exercise the foregoing power relative to the continuing of investments without her previous consent in writing. Wife's consent made necessary.

8. I DECLARE that the actual yearly produce of my residuary personal estate whether consisting of investments to be made by my trustees as aforesaid or of investments of whatever nature to be continued by them as aforesaid shall as well during the first year after my death (and without any apportionment of periodical payment current at my decease) as in subsequent years be deemed the income of such personal estate for the purposes of my will. The actual produce of investments to be deemed income.

9. I DECLARE that my wife shall while she remains my widow have the power to appoint new trustees of my will (*e*). Power to appoint trustees.

10. *Investment clause.* See note (*b*) to Prec. 4, *and add to any investment clause* subject during the widowhood of my wife to the provisions of clause 7 of this my will.

11. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 15.

(*a*) See note (*f*), Prec. 12.

(*b*) A gift by will *prima facie* imports bounty; and yet, in spite of this seemingly obvious principle, it has been long an established doctrine that where a person who is under an obligation to pay a sum of money bequeaths by his will to his creditor a pecuniary legacy equal to, or greater than, the amount of such debt, he is presumed to mean to discharge the obligation, and not to confer an additional benefit on the legatee, except, indeed, so far as the legacy may happen to exceed the debt, *Brown* v. *Dawson*, Prec. Ch. 240; *Talbot* v. *Duke of Shrewsbury*, *ib.* 394; *Fowler* v. *Fowler*, 3 P. W. 353; *Bensusan* v. *Nehemias*, 4 De G. & S. 381; 20 L. J. Ch. 536; *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595; *Re Fletcher*, 38 Ch. D. 373; 67 L. J. Ch. 1032. In the last case, North, J., held that it was not necessary either that the debt should still be in existence at the testator's death, or that the special purpose for which the legacy was given should appear in the will. See further, *Pankhurst* v. *Howell*, L. R. 6 Ch. 136; *Re Smythies*, [1903] 1 Ch. 259; Debts when satisfied by legacies. Doctrine of satisfaction does not apply—cases where.

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72 L. J. Ch. 216; *Re Rattenberry*, [1906] 1 Ch. 667; 75 L. J. Ch. 304. But a legacy of less amount is not a satisfaction even, *pro tanto*, *Eastwood* v. *Vinke*, 2 P. W. 613; and it seems that, where there are several debts, a legacy equal to one of them will not satisfy such debt, *Graham* v. *Graham*, 1 Ves. S. 262; nor in any case will a debt be satisfied by a general or residuary bequest, *Barret* v. *Beckford*, 1 Ves. S. 519; *Devese* v. *Pontet*, 1 Cox, 188; nor *a fortiori*, by the gift of something entirely different. Thus, the gift of an estate, or an annuity, would not bar the right of the devisee or legatee to a pecuniary debt, or *vice versa*, *Cranmer's Case*, 2 Salk. 508; *Richardson* v. *Elphinstone*, 2 Ves. J. 463. It is clear, too, that a debt will not be satisfied by a legacy of equal or greater amount, payable expressly at a more distant period, *Nicholls* v. *Judson*, 2 Atk. 300; *Haynes* v. *Mico*, 1 Br. C. 129; *Adams* v. *Lavender*, M'C. & Y. 41; nor will a debt, absolutely payable, be satisfied by a legacy which is subject to a contingency, *Tolson* v. *Collins*, 4 Ves. 483; though *contra*, it seems, if a legacy originally contingent becomes absolute from circumstances occurring in the lifetime of the testator, *Mathews* v. *Mathews*, 2 Ves. S. 635; *sed qu.* A very slight variation in the mode of payment, rendering the legacy less beneficial than the debt, is sufficient to rebut the presumption; such as the circumstances of the legacy being payable a month after the testator's death, and the debt *instanter*, *Clark* v. *Sewell*, 3 Atk. 96; or the circumstances that the debt is payable within three months of testator's death and no time is fixed for payment of the legacy, *Re Horlock*, [1895] 1 Ch. 516; 64 L. J. Ch. 325; or (where the subject is an annuity) the circumstance of the bequeathed annuity having a later beginning than the annuity to which the legatee is entitled, *Richardson* v. *Elphinstone*, 2 Ves. J. 463; or of the former being subject to deductions from which the latter is exempt, *Atkinson* v. *Webb*, Pre. Ch. 236; nor is the effect of differences of this nature neutralised by a superiority in other respects, rendering the legacy upon the whole more valuable than the debt, *Lee* v. *Brown*, 4 Ves. 362. See also *Charlton* v. *West*, 30 Be. 124; 30 L. J. Ch. 815; *Smith* v. *Smith*, 3 Giff. 263; 31 L. J. Ch. 91. In *Wathen* v. *Smith*, 4 Mad. 325, it was held that the presumption of satisfaction was not negatived by the circumstance of the legacy being payable at an earlier period than the debt; but see *Cole* v. *Willard*, 25 Be. 568. If a deed by which the testator covenants to pay a sum of money at his death is contemporaneous with his will by which he gives a sum of the same amount to the covenantee, so that both documents are present to the donor's mind when he executes each of them, this is a strong reason against holding the gift in one to be a satisfaction of the obligation to pay, under the other, *Horlock* v. *Wiggins*, 39 Ch. D. 142; 58 L. J. Ch. 46.

Remarks on the doctrine of satisfaction of debts.

A legacy given to a creditor in satisfaction of the testator's debt to him abates with the general legacies in case of insufficiency of assets. A debt forgiven by a will is a specific legacy, and does not abate with the general legacies, *Re Wedmore*, [1907] 2 Ch. 277; 76 L. J. Ch. 486. And a legacy on condition that the legatee releases a claim under a settlement will abate with other legacies and has no priority, *Re Whitehead*, [1913] 2 Ch. 56; 82 L. J. Ch. 302.

The doctrine of satisfaction does not apply to a debt due upon a negotiable security, which may not be in the hands of the legatee, *Carr* v. *Eastabrooke*, 3 Ves. 561; nor to a debt constituted of the balance of a running account, the result of which may be unknown to the testator,

Rawlins v. *Powel*, 1 P. W. 299; nor, under the old law, was it applicable to debts contracted after the making of the will, *Cranmer's Case*, 2 Salk. 508; nor where the will contains an express trust or direction for the payment of debts and legacies, *Chancey's Case*, 1 P. W. 408; *Richardson* v. *Greese*, 3 Atk. 65; *Hassell* v. *Hawkins*, 4 Drew. 468; and a direction to pay debts, without mentioning also legacies, is sufficient to rebut the presumption of satisfaction, *Pinchin* v. *Simms*, 30 Be. 119; *Re Huish*, 43 Ch. D. 260; 59 L. J. Ch. 135; disapproving *Edmunds* v. *Low*, 3 K. & J. 318; 26 L. J. Ch. 432.

Where a testator directed his executors and trustees to pay his just debts, including the debts not paid in full proved under a commission of bankruptcy, it was held that such a direction must be regarded as bounty, not only in favour of the creditors who survived the testator, but of the representatives of those who predeceased him, *Turner* v. *Martin*, 7 D. M. & G. 429; 26 L. J. Ch. 216.

Satisfaction of debts.

The judges have considered the doctrine as too firmly established to be broken through; but they have for years steadily refused to push the doctrine one step further than their predecessors had gone, and have gladly availed themselves of any circumstances however trifling, or discrepancies however slight, between the debt and the thing given, in order to remove cases out of a rule which has been judicially characterised as a "false principle," see Kindersley, V.-C., in *Hassell* v. *Hawkins*, 4 Drew. 468. The presumption of satisfaction is based upon the maxims *Debitor non presumitur donare*, and "Be just before you are generous"; but, as was remarked by Lord Chancellor King, *Chancey's Case*, 1 P. W. 408, "When a man left such an estate and fund for his debts and legacies, as that he might thereout be both just and bountiful, in such case I do not see but it would be as reasonable that the whole legacy should take effect as a legacy, and that the debt should be paid besides."

Whether servants' claims for wages are satisfied by legacies.

It is not quite clear whether debts owing to servants for wages are liable to be satisfied by legacies. In the case of *Richardson* v. *Greese*, 3 Atk. 69, Lord Hardwicke observed that legacies to servants had never been held to be in satisfaction of debts. No such exception was suggested in *Chancey's Case*, 1 P. W. 408, where the legatee was a servant; but the case did not raise the point; and it is observable that Lord Eldon, in *Wallace* v. *Pomfret*, 11 Ves. at 546, where also the legatee was the testator's servant, chose to rest his decision in favour of the legatee upon other grounds. Where a particular motive is assigned for the gift, satisfaction of a debt will not be presumed, *Mathews* v. *Mathews*, 2 Ves. S. 635; and any mention of lengthened or meritorious services, or an expression of the testator's esteem for the legatee, would probably be held to be a sufficient assignment of motive to remove the case from the operation of the rule; but the question should be prevented from occurring, by an explicit declaration of the testator's intention that the legacy is to be in addition to the sum owing for wages.

See further respecting the satisfaction of debts by legacies, the notes to *Ex parte Pye*, 18 Ves. 140; *Sir John Talbot* v. *Duke of Shrewsbury*, Pre. Ch. 394; and *Chancey's Case* (*sup.*), in 2 Tud. L. C. Eq.

Satisfaction of portions.

But though the leaning of the Courts is against the presumption of satisfaction of debts, there is, on the other hand, a leaning in favour of the presumption of the satisfaction of portions by legacies. Where a legacy from a parent, or person *in loco parentis*, is as great as, or greater than, the portion previously secured to the legatee, such legacy

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is presumed to be intended as a complete satisfaction, *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; and so strong is the inclination of equity against double portions, that if the legacy be smaller in amount than the previous provision, it is presumed to be a satisfaction *pro tanto*, *Warren* v. *Warren*, 1 Cox, 41; and slight differences between the previous settlement and the will are not sufficient to rebut the presumption, *Hinchcliffe* v. *Hinchcliffe, sup.*; *Sparkes* v. *Cator*, 3 Ves. 530; *Pole* v. *Somers*, 6 Ves. 309; *Russell* v. *St. Aubyn*, 2 Ch. D. 398; 46 L. J. Ch. 641. A bequest of a residue or the part of a residue may be a satisfaction of a portion, either altogether or *pro tanto* according to the amount, *Thynne* v. *Glengall*, 2 H. L. C. 131. The question of satisfaction is one of intention, *Chichester* v. *Coventry*, L. R. 2 H. L 71; 36 L. J. Ch. 673; *Montagu* v. *Earl of Sandwich*, 32 Ch. D. 525; 55 L. J. Ch. 925; *Re Lacon*, [1891] 2 Ch. 482; 60 L. J. Ch. 403; *Re Blundell*, [1906] 2 Ch. 222; 75 L. J. Ch. 561; and a direction in the will to pay the testator's debts is a material circumstance, *Paget* v. *Grenfell*, L. R. 6 Eq. 7; 37 L. J. Ch. 833; but as to this, see *Re Tussaud's Estate*, 9 Ch. D. 363; 47 L. J. Ch. 849; *Re Vernon*, 95 L. T. 48. See also note (*b*), Prec. 26. And a gift of a partnership may satisfy a prior obligation to pay money, *Re Lawes*, 20 Ch. D. 81; and see *Bengough* v. *Walker*, 15 Ves. 507. But see also *Re Jaques*, [1903] 1 Ch. 267; 72 L. J. Ch. 197.

A testator, on the marriage of his son, had covenanted to bequeath a sum not less than £2,500, to be held upon the trusts of the settlement; by his will he appointed £2,500 out of a fund over which he had a special power of appointment in favour of his children, and to which his children were entitled in default, and he declared that such appointment should be taken in full discharge of the covenant; it was held that the appointment was not a satisfaction of the covenant, and that the covenant constituted a specialty debt of the testator for £2,500, *Graham* v. *Wickham*, 1 D. J. & S. 474.

Performance of covenants and satisfaction by intestacy.

Analogous to cases of satisfaction previously considered, but distinct therefrom (see 1 P. W. 324, n.; and 1 Sw. 220), are cases of performance of covenants to leave sums of money, or make other testamentary provisions, by allowing property to devolve by intestacy. The rule in this class of cases is, that where a person covenants to do a certain thing, and he does what is wholly or partially equivalent to the performance of his covenant, he shall be presumed to have so done with the intention of *pro tanto* performing his covenant. Thus A. covenanted on his marriage to purchase lands worth £200 per annum, and settle them for the jointure of his wife, and to the first and other sons of the marriage in tail; he purchased the lands, but made no settlement, and on his death the lands descended to the eldest son; it was held that the lands descended were a satisfaction of the covenant, *Wilcocks* v. *Wilcocks*, 2 Ver. 558. Again, A. covenanted, before marriage, to leave his intended wife £620; the marriage took place, and A. died intestate; the wife's share of his property amounted to more than £620, and this was held to be a satisfaction, *Blandy* v. *Widmore*, 1 P. W. 324. See also *Thacker* v. *Key*, L. R. 8 Eq. 408. That covenants may be in this way executed in part, see *Lechmere* v. *Lord Carlisle*, 3 P. W. 211; *Garthshore* v. *Chalie*, 10 Ves. 1.

Covenant not satisfied by a residue, or distributive share.

But a gift by will of a residue will not, *per se*, be considered a performance of a covenant to leave a widow a certain sum, *Devese* v. *Pontet*, 1 Cox, 188. But a bequest of residuary income may satisfy a covenant to pay an annuity of less value, *Re Hall*, [1918] 1 Ch. 562;

87 L. J. Ch. 393. Where a husband covenanted to pay the interest of a sum of money to his widow for her life, this was held not to be satisfied by her distributive share on his intestacy, *Couch* v. *Stratton*, 4 Ves. 391. So also a covenant to leave an annuity to a widow is not performed by a distributive share devolving on the death of the husband intestate, *Salisbury* v. *Salisbury*, 6 Ha. 526; 17 L. J. Ch. 480.

As to a covenant by a father, upon the marriage of his daughter, that he would, either by act *inter vivos*, or by will, provide for his daughter, who, however, died in her father's lifetime, see *Jones* v. *How*, 7 Ha 267; 19 L. J. Ch. 324, in which case the Court of C. P. certified that the representative of the daughter had no good cause of action against the executors of the father, and the Equity Court concurred in the certificate. Where the covenant is to provide by will, the covenantor is not bound so to frame his will as to guard the child's interest against lapse, *Re Brookman's Trust*, L. R. 5 Ch. 182; 38 L. J. Ch. 585; and see L. R. 6 Ex. 302. A sum of £600, to which a married woman was entitled for her separate use, was paid to her husband, who by his will gave her £2,800, and directed his executor to pay all his debts, and to take all the residue of his property; the husband died, the widow received the £2,800, and executed a general release to the executor as to all matters under the will; the widow filed her bill for the payment of the £600; it was held that the £600 existed as a debt, and that the legacy of £2,800 was not intended to be in satisfaction of such debt; and that the widow was entitled to payment, notwithstanding the execution of the release, *Rowe* v. *Rowe*, 2 De G. & S. 294; 17 L. J. Ch. 357.

Separate property of married woman paid to husband, a debt undischarged by legacy of larger sum.

Where the husband covenants to pay money in his lifetime, a distributive share is no satisfaction; in such a case there is an actual breach, not a performance, of the covenant, and a debt is due to the wife, *Oliver* v. *Brickland* or *Brighouse*, cited 1 Ves. S. 1; 3 Atk. 420; 10 Ves. 12.

See further as to performance of covenants and satisfaction by intestacy, the notes to *Wilcocks* v. *Wilcocks*, 2 Ver. 558, and *Blandy* v. *Widmore*, 1 P. W. 324, in 2 Wh. & Tud. L. C. Eq. 413.

(*c*) See note (*b*), Prec. 4.

(*d*) Devises and bequests in trust, which impose on the devisees and legatees the duty of converting the property (and almost every residuary disposition includes an express or implied trust of this nature to some extent), have often been defective in not giving to the trustees a discretionary power to postpone the conversion, and in omitting to dispose of the income in the meantime. An instance of the latter kind of omission occurs where a testator directs his real and personal estate to be sold, and the produce to be laid out in government or real security, of which the income is given to a person for life, with a gift over of the capital. According to the literal terms of the will, the legatees take nothing until the sale, which might be deferred, either from circumstances inevitably preventing it, or from the negligence of the trustees, for a considerable period. Such an extended postponement of the legatee's interest clearly is not meant. In comparison with such a scheme an approach to the intention would probably be made, by permitting the legatee for life to take the income of the property while unsold; but this is unauthorised by the words of the will, for they give only the income of the fund constituted of the proceeds, which obviously might yield a very different amount. For instance, supposing part of the residue to consist of leaseholds held for a short term of years; to

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defer the sale and pay over the rents to the legatee for life, would place an undue advantage in his hands, at the expense of the ulterior legatees; while, on the other hand, if the subject-matter were a reversion, the delay in the conversion of the property would be no less unfairly advantageous to those legatees. Equal justice to these respective parties seems to require that some period should be fixed (irrespective not only of the greater or less degree of activity of the trustees in effecting a sale, but also, even of circumstances which might, probably or necessarily, delay and impede it), at which the property shall for this purpose be considered as sold, and the parties placed, so far as may be practicable, in the same situation as if the sale had then taken place; or, in other words, that there should be a period of constructive conversion, distinct from and independent of the actual conversion. And this we shall find has been effected, not only where the income accruing before the sale or conversion of the property is undisposed of, but also where the intermediate income is expressly directed to be accumulated; for even in the latter case, it is not to be supposed that the testator intended that the beneficial interests of the legatees should be subject to all the accidents by which the sale is liable to be deferred. As regards land, every trust for sale implies, after 1925, a power of postponement under sect. 25 of the Law of Property Act, 1925, and the net rents and profits until sale will, subject to any direction to the contrary, be applicable as income of investments of the purchase money, under sect. 28 (2) of the Law of Property Act, 1925.

Rules deduced from the cases.

The following positions exhibit the doctrine of the cases.—*First.* In the ordinary case of residuary property being directed to be sold or otherwise converted into money, and the produce (either with or without a prior express trust for payment of debts and legacies) invested upon authorised security, for the benefit of a person for life, at whose death the capital is given to other persons, without any direction to accumulate the profits accruing before the conversion, the income arising from such part of the residue as at the time of the testator's death was invested in securities of the kind authorised by the will, belongs to the residuary legatee for life from the period of the testator's death, *Hewitt* v. *Morris*, T. & R. 241; *Angerstein* v. *Martin*, T. & R. 232; 2 L. J. Ch. 88; *Brown* v. *Gellatly*, L. R. 2 Ch. 751. *Secondly.* In the case last described, the destination of the income arising within the year from such part of the residue as falls within the scope of the converting trust (the same not being composed of or invested upon securities such as are authorised by the will) is more doubtful: it is now settled that the tenant for life is entitled from the death of the testator, *Macpherson* v. *Macpherson*, 1 Macq. 243; but the difficulty still remains in what manner is he to have the benefit of the rule as between himself and those entitled in remainder? The true principle seems to be that, with respect to that part of the residue which at the testator's death is not invested in authorised securities, the tenant for life, during the first year after testator's death, is entitled to so much income as the property would have produced if invested according to the will, *Dimes* v. *Scott*, 4 Rus. 209; *Taylor* v. *Clark*, 1 Ha. 161; 11 L. J. Ch. 189; *Morgan* v. *Morgan*, 14 Be. 72; *Holgate* v. *Jennings*, 24 Be. 623; *Re Llewellyn's Trust*, 29 Be. 171; *Brown* v. *Gellatly*, L. R. 2 Ch. 751; *Re Owen*, [1912] 1 Ch. 519; *Re Evan's Will Trusts*, [1921] 2 Ch. 309. *Thirdly.* Where trustees are directed to convert the property, and, until the conversion, the income is to be added to the capital, and the

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conversion is deferred beyond the period of a year from the testator's death, the process of accumulation ceases, and the title of the legatee for life to the income begins, at the end of such year from the testator's death, this being considered to afford a reasonable time for the conversion of the property, *Sitwell* v. *Bernard*, 6 Ves. 520, and the cases there cited, *Kilvington* v. *Gray*, 2 S. & S. 396; *Vickers* v. *Scott*, 3 M. & K. 500; 3 L. J. Ch. 223; *Tucker* v. *Boswell*, 5 Be. 607. *Fourthly.* With respect to such portion of the property as is converted before the end of the year following the testator's death, the legatee for life takes the actual income of the fund constituted of the proceeds from the time of its investment, and that too without regard to the fact whether there was or was not a trust to accumulate the profits until conversion, *La Terriere* v. *Bulmer*, 2 Sim. 18. *Fifthly* If the property is not actually converted at the end of a year the legatee for life will be entitled to the dividends which would have accrued from the investment at that time on authorised securities. And this rule applies as well where the fund or property is of a permanent nature, as where it is terminable and temporary, as leaseholds, long annuities, &c., *Dimes* v. *Scott*, 4 Rus. 209; *Mills* v. *Mills*, 7 Sim. 501; 4 L. J. Ch. 266.

Where property is left on trust for conversion and out of the proceeds to pay a fixed sum to A. and the residue to B., and conversion is postponed, and the estate becomes greatly increased in value, A. has no claim to any share of such increased value, but only to his fixed sum with usual interest, *Re Campbell*, [1893] 3 Ch. 468; 62 L. J. Ch. 878.

Remarks upon *Dimes* v. *Scott*.

The principle of distribution established by the case of *Dimes* v. *Scott* would, it is conceived, apply, even where the residuary clause contained no express trust for conversion, with respect to property of a limited duration, such as leaseholds for short terms, terminable annuities, &c., the income arising from which ought, from the period of the testator's death, to be carried to account as capital; and in lieu of such income the executors should pay to the legatee for life, from the testator's decease, such sum as the dividends on authorised securities, purchased with the actual produce of the sale, would amount to, in case the sale takes place within a year from the testator's death; and if not, then such sum as would be equal to the dividends arising from the investment of the proceeds of the sale, in case the same had been made at the year's end, together, in either case, with dividends on the interim income of the terminable unconverted property, *Howe* v. *Lord Dartmouth*, 7 Ves. 137; *Fearns* v. *Young*, 9 Ves. 549; *Mills* v. *Mills*, 7 Sim. 501; 4 L. J. Ch. 266; *Re Whitehead*, [1894] 1 Ch. 678; 63 L. J. Ch. 229 (terminable annuity—no trust for conversion); but see *Crawley* v. *Crawley*, 7 Sim. 427; 4 L. J. (N.S.) Ch. 265; and *Sutherland* v. *Cooke*, 1 Col. 503; 14 L. J. Ch. 71, where interest at four per cent. was allowed to the tenant for life. And it makes no difference that the life interest is interposed by codicil, *Macdonald* v. *Irvine*, 8 Ch. D. 101; 47 L. J. Ch. 494.

With respect to that part of a residue not expressly directed to be sold, which is undergoing no diminution by lapse of time, and is invested in permanent real securities, it is clear that the doctrine in question would not apply, but that the executor would be warranted in paying to the residuary legatee for life the income of the property, according to its actual state, *Mills* v. *Mills*, 7 Sim. 501; 4 L. J. Ch. 266; *Howe* v. *Lord Dartmouth*, *sup.*; *Morgan* v. *Morgan*, 14 Be. 72. And even in regard to decaying property, the doctrine which requires its conver-

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life is entitled *in specie*.

sion, and an investment of the proceeds in a permanent fund, will, of course, yield to expressions showing that the testator meant to give the legatee for life the actual income, according to the existing state of the property, *Vincent* v. *Newcombe*, 1 You. 599; 2 L. J. Ex. 15; *Cockran* v. *Cockran*, 14 Sim. 248; but see *Re Wareham*, [1912] 2 Ch. 312; 81 L. J. Ch. 578. *A fortiori*, trustees are not justified in converting into a permanent stock Terminable Annuities which are specifically bequeathed in trust for a person for life, and then to other persons absolutely, *Lord* v. *Godfrey*, 4 Mad. 455; see also *Neville* v. *Lord Fortescue*, 16 Sim. 333; *Hubbard* v. *Young*, 10 Be. 203; 16 L. J. Ch. 182; *Goodenough* v. *Tremanondo*, 2 Be. 514, n.; as to leaseholds, *Hind* v. *Selby*, 22 Be. 373. In *Re Game*, [1897] 1 Ch. 881; 66 L. J. Ch. 505, a testator directed that the rents and profits of his residuary real and personal estate should be paid to his wife for life; and after her decease he gave his residuary estate to others, in succession, subject to certain annuities, and conferred on the annuitants a power of distress. The residuary estate consisted of freeholds and leaseholds. *Held*, that neither the direction to pay rents nor the power of distress afforded any sufficient indication of an intention that the leaseholds should be enjoyed *in specie*. See also, where *Re Game* was followed, *Re Wareham*, [1912] 2 Ch. 312; 81 L. J. Ch. 578.

If the will authorises the retention of securities which under the will would not be authorised investments, and those securities are not of a wasting nature, the tenants for life will be entitled to receive *in specie* the outcome of those securities, *Re Sheldon*, 39 Ch. D. 50; 58 L. J. Ch. 25.

Where there is a direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention does not necessarily give the tenants for life the enjoyment *in specie* of the securities retained by the trustees in the exercise of their discretion. But the Court will look with an expectant eye for a direction that the tenant for life shall receive the income of the retained securities. See *Re Thomas*, [1891] 3 Ch. 482; 60 L. J. Ch. 781; *Re Chaytor*, [1905] 1 Ch. 233; 74 L. J. Ch. 106; *Re Godfree*, [1914] 2 Ch. 110; 83 L. J. Ch. 734; *Re Inman*, [1915] 1 Ch. 187; 84 L. J. Ch. 309. And see *Re Aste*, 118 L. T. 433, and *Re Barratt*, [1925] 1 Ch. 550. The tenant for life would otherwise receive interest at 4 per cent. upon the retained securities, *Re Beech*, [1920] 1 Ch. 40; 89 L. J. Ch. 9. Where there is a gift of the testator's general estate upon trust for conversion, and the will contains a power to postpone conversion, with the usual direction that until conversion the income shall be applied in the same manner as the income of the trust estate after conversion, and the trustees carry on a business carried on by the testator, the profits of such business will be payable to the tenant for life as income, *Re Chancellor*, 26 Ch. D. 42; 53 L. J. Ch. 443; *Re Crowther*, [1895] 2 Ch. 56; 64 L. J. Ch. 537.

It may be observed, that the mere fact of the testator having expressly directed the sale and conversion of a portion of his residuary property is not sufficient of itself to take the rest of the property out of the general rule, and entitle the tenant for life to an enjoyment *in specie*, *Cafe* v. *Bent*, 5 Ha. 24; 13 L. J. Ch. 169.

Actual income until conversion

In order to prevent questions of this nature, and to relieve executors and trustees from the onerous task of entering into the complex calcu-

lations which the doctrine of some of the cases would require, every will ought to contain a direction entitling the beneficial legatee for life to the actual income of the property until conversion, whether derived from temporary or permanent sources, *Re Norrington*, 13 Ch. D. 654; thereby reconciling the legal duty with the ordinary conduct of executors and trustees, and giving effect to the intention of the testators, which, there can be little doubt, is commonly defeated by applying the principle of *Dimes* v. *Scott*, *ante*, p. 234. In general, too, trustees who are directed to sell ought to be expressly invested with a discretion as to the period of sale, *Gray* v. *Siggers*, 15 Ch. D. 74; 49 L. J. Ch. 819; *Walker* v. *Shore*, 19 Ves. 387. A power to postpone sale has been held not to be an indefinite power, *Re Crowther*, [1895] 2 Ch. 56, 60; *Re Horsnail*, [1909] 1 Ch. 631, 635; *Re Kipping*, [1914] 1 Ch. 62; *Re Marshall*, *ibid.* 192; *Re Craven*, *ibid.* 358; but the duration of a trust for sale of land will, after 1925, be regulated by sects. 23 and 25 of the Law of Property Act, 1925 (*ante*, p. 227). Where there has been no undue delay on the part of the trustees in converting the property, and the will contains a clause entitling the tenant for life to the actual income, no allowance is made to him for any portion of the estate which is unproductive, *Mackie* v. *Mackie*, 5 Ha. 70; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107; 69 L. J. Ch. 562. In *Re Pitcairn*, [1896] 2 Ch. 199; 65 L. J. Ch. 120, where the question arose with reference to a reversionary interest, it was held that a discretion as to conversion given to the trustees excluded the application of the rule in *Howe* v. *Dartmouth*. See also *Re Bentham*, 94 L. T. 307; *Re Rogers*, [1915] 2 Ch. 437; 84 L. J. Ch. 837.

should be expressly given.

Discretion as to period of conversion.

See further, on the conversion of residue bequeathed to persons in succession, *Howe* v. *Lord Dartmouth*, 7 Ves. 137, and the notes thereto, in Tud. L. C. Eq.; and on a power to convert personalty into realty, *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. 524. See also *Johnston* v. *Moore*, 27 L. J. Ch. 453; *Stroud* v. *Gwyer*, 28 Be. 130, cases relating to partnership property; and *Re Evans*, [1913] 1 Ch. 23; 82 L. J. Ch. 12, as to shares in a company.

The life tenant of residuary personalty is only entitled to the *true* residue. The income arising within a year after the testator's death from so much of his estate as is required for payment of debts and legacies is not income of residuary estate in the absence of a contrary intention expressed, *Allhusen* v. *Whittell*, L. R. 4 Eq. 295; 36 L. J. Ch. 929. But the "year" in the rule in *Allhusen* v. *Whittell* may be shortened by earlier payment of debts, *Re McEuen*, [1913] 2 Ch. 704. See p. 397, note (*a*), *post*. See generally on the subject of adjustments between tenant for life and remainderman relating to express or implied trusts for conversion, Strachan's Law of Trust Accounts, ch. xix; Chandler's Trust Accounts, 89 *et seq.*; and as to apportionment of annuities between tenant for life and remainderman, see the Law Quarterly Review, vol. xxxi. p. 421.

Allhusen v. *Whittell*.

(*e*) See note (*f*) to Prec. 6.

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No. XVI.

WILL *of a* WIDOWER, *disposing of Real and Personal Property in favour of his Children with ulterior Trusts in favour of other Objects.—Real and Personal Estate vested in Trustees for Sale and Conversion; Produce to be invested, and Fund divided among the Children equally; but a Moiety of each Child's Share is Settled upon Trust for the Child and its Issue.—Power to appoint Trustees.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT [*names &c.*] to be executors and trustees of this my will.

Devise of specific lands in fee.

3. I DEVISE my farm and lands situate in the parish of —— in the county of —— partly in my own occupation and partly in the occupation of [*tenant*] to my eldest son [*name*] in fee simple subject to and charged in exoneration of my personal estate and my other real estate if any charged therewith with the payment of all principal moneys and interest specifically charged thereon by any mortgage or any other charges or incumbrances affecting the same at my death (*a*).

General devise of other real estates and bequest of personal estate to trustees, upon trust to sell and get in, &c.;

4. I DEVISE all other the real estate and bequeath all the personal estate which shall belong to me at my death to the said [*names of trustees*] UPON TRUST that my trustees shall sell and convert into money my said real and personal estate when and as they shall in their discretion deem it most advantageous so to do And I declare that in the meantime and until the sale thereof respectively such real and personal estate and the rents interest and yearly produce thereof respectively shall be subject to the trust and provisions hereinafter contained concerning the money to arise therefrom and the income of such money And

—unsold real estate to be deemed personal;

that such real estate shall be considered as converted in equity from the time of my death for the purposes of such trusts and provisions AND I DIRECT my trustees to invest the money to arise

—to invest produce of real and personal estate;

from the real and personal estate to be sold and gotten in as aforesaid in manner hereinafter authorised (*b*) And as to the money to arise as aforesaid and the stocks funds and securities whereon the same shall be invested which moneys stocks funds and securities are hereinafter designated "my trust fund" my trustees shall stand possessed thereof IN TRUST for my child if

only one wholly or for my children if more than one in equal shares But if any of them shall die under the age of twenty-one years without having married [*or* if any of them being a son or sons shall die under the age of twenty-one years or being a daughter or daughters shall die under that age without having been married *or* if any of them shall die under the age of twenty-one years without leaving issue (*or* without leaving a husband or widow or issue) living at his or her death] then as to as well the share originally limited under the preceding trust as the shares eventually limited under this executory trust to any and every child so dying IN TRUST for the others and other (*c*) of my children and if more than one in equal shares And if there shall not be any child of mine who shall attain the age of twenty-one years or marry [*or* who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married *or* who shall attain the age of twenty-one years or dying under that age shall leave issue (*or* leave a husband or widow or issue) living at his or her death] then as to my trust fund IN TRUST for [*name*] if he shall be living at the failure of the preceding trusts in favour of my child or children for his absolute use But if he shall not be then living IN TRUST for such of the several persons following (namely) [*names*] as shall be then living to take if more than one in equal shares And if none of them shall be then living IN TRUST for such issue then living of the last-named persons as shall either before or after the vesting in possession of this trust attain the age of twenty-one years or marry to take if more than one as tenants in common and distributively according to the stocks.

—for testator's children equally, with benefit of accruer;

[—different periods of absolute vesting;]

—on failure of the previous trusts;

—for a person named, if then living; if not,

—for such several persons named as shall be then living; if none,

—for their issue then living, *per stirpes*.

5. I DECLARE that my trustees shall retain and stand possessed of one moiety of the share which shall become absolutely vested in each child of mine under the trusts aforesaid upon the trusts following (namely) UPON TRUST to pay the annual produce to the same child being of the age of twenty-one years for his life or her life and if the same child shall be a daughter and married then for her separate use and not by way of anticipation And after the death of the same child IN TRUST for all or any of the children and more remote issue of the same child (such more remote issue to be born in the lifetime of the same child) in such manner as the same child shall by deed or will appoint And in default of appointment UPON TRUSTS and subject to provisions in favour of the children of the same child corresponding with the trusts and provisions hereinbefore contained in favour of my own children (exclusive of the trusts declared by this proviso) but so that no appointee under the aforesaid power of appointing to children and issue shall participate in the unappointed fund

Trustees to hold a moiety of each child's share upon trusts,

—for the same child for life;

—for the child's issue, as the child shall appoint;

—for the child's children, by reference to the previous trusts for the testator's children;

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without bringing the appointed share or interest into hotchpot And if there shall not be any child of the same child who shall attain, &c. [*as before in respect of testator's children*] then if the same child shall be a son IN TRUST for his absolute use or if the same child shall be a daughter IN TRUST for such persons and in such manner as she shall by will appoint And in default of appointment IN TRUST for such person or persons as would by law have become entitled to the said trust premises had she been absolutely entitled thereto and died intestate a widow and domiciled in England such persons if more than one to take the shares which they would have taken by law.

—for the child absolutely, if a son;

—if a daughter, for such persons as she shall by will appoint;

—in default, for her next-of-kin.

Shares of children dying in testator's lifetime subjected to the trusts of the above moiety.

6. I DECLARE that if any child of mine shall die in my lifetime and any issue of such child shall be living at my death then the share which any or every such child of mine would if living have taken of my trust fund shall be subject to the same trusts and provisions in favour of the children of the same child as are hereinbefore referentially declared of a moiety of the share of each child of mine and as shall be capable of taking effect but so subject shall follow the destination of the residue of my trust fund.

Power to appoint new trustees.

7. I DECLARE that if both the said [*names of above trustees*] die in my lifetime it shall be lawful for [*name*] or his executors or administrators for the time being to appoint within [*six*] calendar months of my death new trustees in the place of those hereinbefore appointed.

8. *Investment clause.* See note (*b*) to Prec. 4.

9. *Trustee interpretation clause, as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 16.

As to the exoneration of devised estates in mortgage.

(*a*) It should always be expressly stated in what manner a mortgage debt or charge on specifically devised or bequeathed property is to be borne. Previously to the Real Estates Charges Act, 1854, commonly called Locke King's Act (17 & 18 Vict. c. 113), the heir-at-law or devisee of mortgaged real estate, in accordance with the general rule that a testator's personalty is the primary fund for the payment of his debts unless expressly or by clear implication exempted therefrom, was entitled to have the land exonerated from the mortgage, and might require that the charge should be satisfied out of the general personal estate of the testator, unless in the case of a devise it was manifest from the will that the devisee was intended to take the estate subject to the charge.

After 1925 charges on realty or personalty will be paid primarily out of the property charged, under sect. 35 of the Administration of Estates Act, 1925, which replaces the provisions of the Real Estates Charges Acts and applies to all property. Sect. 35 of the Administration of Estates Act, 1925, provides as follows:—

Charges on property of deceased to

Sect. 35.—"(1.) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory

power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

be paid primarily out of the property charged.

"(2.) Such contrary or other intention shall not be deemed to be signified—

"(a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or

"(b) by a charge of debts upon any such estate;

unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

"(3) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise."

As to what amounts to a lien for unpaid purchase-money within the meaning of the Act, see *Re Kidd*, [1894] 3 Ch. 558; 63 L. J. Ch. 855; *Kettlewell* v. *Watson*, 26 Ch. D. 501; 53 L. J. Ch. 717.

As to what is a "contrary or other intention," see *Re Smith*, 33 Ch. D. 195; 55 L. J. Ch. 914; *Re Fleck*, 37 Ch. D. 677; 57 L. J. Ch. 943; *Re Campbell*, [1893] 2 Ch. 206; 62 L. J. Ch. 594; *Re Valpy*, [1906] 1 Ch. 531; 75 L. J. Ch. 301; *Re Birch*, [1909] 1 Ch. 787; 75 L. J. Ch. 385; *Re Major*, [1914] 1 Ch. 278; 83 L. J. Ch. 461.

(*b*) See note (*b*), Prec. 4.

Suggestions respecting clauses of accruer.

(*c*) Clauses of accruer should be so framed that the shares of objects dying may go not merely to survivors properly so called, but to the others of the devisees or legatees, thereby conferring on predeceased devisees or legatees (dying in circumstances which do not subject their shares to the divesting operation of the clause) disposable and transmissible interests, *Re Walter*, 56 S. J. 632. In fact, under a clause of accruer, correctly framed, each object, living the rest, and during the suspense of the absolute vesting of their shares, has a present disposable interest in such shares, every one of which is *ab initio* limited to him by way of executory devise or bequest. Cross-remainders stand upon the same principle.

Clauses of accruer

—should be extended to *others* as well as survivors.

By way of illustration:—Suppose real or personal estate to be given by will equally among A., B., and C., with a gift over of the shares of any of them dying under the age of twenty-one years to the survivors or survivor; A. attains twenty-one and then dies; afterwards B. dies under twenty-one. Would the share of B. be divided between C. and the representatives of A., or go exclusively to C.? If the words "survivors" or "survivor" were construed literally, the share in question would belong wholly to C.; if construed "others or other," the representatives of A. would participate. It seems that the strict construction generally prevails, *Crowder* v. *Stone*, 3 Rus. 217; 7 L. J. (o.s.) Ch. 93; *Milsom* v. *Awdry*, 5 Ves. 465; *Re Corbett's Trusts*, Joh. 591; and that "survivor" will not be read "other" unless there be an explanatory context. See *Harrison* v. *Harrison*, [1901] 2 Ch. 136; 70 L. J. Ch. 551; *Inderwick* v. *Tatchell*, [1903] A. C. 120; 72 L. J. Ch. 393; *Olphert*

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v. *Olphert*, [1903] 1 Ir. R. 326. On the other hand, the latter construction has certainly prevailed in a few cases, even where it was unaided by the context, *Aiton* v. *Brooks*, 7 Sim. 204; *Cole* v. *Sewell*, 2 H. L. C. 186. In the former case, Sir L. Shadwell, V.-C., E., seemed to consider the strict interpretation to apply only where the gift was to survivors simply and absolutely, and that the more liberal construction might be adopted where such gift was to take effect on a contingency; but this distinction does not reconcile the authorities; as, in many of the cases in which "survivor" has been construed strictly, the gift was dependent on some collateral event. See Jarm. Wills, 2103.

"Survivor."

In *Re Bowman*, 41 Ch. D. 525, Kay, J., formulated three rules, the first two of which are:—1. Where the gift is to A., B., and C. equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over. 2. If to similar words there is added a limitation over if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent. The third rule in *Re Bowman* has been dissented from, and it is now settled that the word "survivor" will generally be construed strictly unless there is a gift over or some other clear indication of an intention to oust that construction, *Harrison* v. *Harrison*, *supra*; *Inderwick* v. *Tatchell*, *supra*; *Powell* v. *Hellicar*, [1919] 1 Ch. 138.

"Survivor," meaning "longest liver."

As to "survivor" being construed to mean "longest liver," see *King* v. *Frost*, 15 App. Cas. 548. The "survivor" of two persons who predeceased the testator was construed as the survivor *inter se* in *Re Wood*, 68 S. J. 186. For the construction of a gift to "survivors and others," see *Slade* v. *Parr*, 7 Jur. 102; and to "other surviving," see *Re Arnold's Trusts*, L. R. 10 Eq. 252; 39 L. J. Ch. 875. The large number of cases on this much-debated point strongly evinces the expediency of preventing its occurrence by an express gift to the others, omitting survivors. See Jarm. Wills, ch. 55.

Accruing shares to be subjected to the operation of clauses of accruer.

Another caution to be observed in regard to the clauses under consideration is to make them expressly embrace the accruing as well as the original shares; otherwise their operation is confined to the original shares, see Hawkins, Constr. Wills, 319. Thus, if real or personal estate is given to A., B., and C., and it is provided that, in case of the death of any of them under the age of twenty-one years, their or his shares or share shall go to the others or other of them: A. dies under twenty-one, by which event his share devolves to B. and C. in moieties; if this is followed by the death of B. who dies under twenty-one, it is clear that, in the absence of a context evincing a contrary intention, the moiety which B. derived under the clause in question of A.'s share does not go over to C. along with B.'s original share, but is transmissible to the representatives of B., as having vested in B. unaffected by the cross executory gift, *Woodward* v. *Glasbrook*, 2 Ver. 388; *Ex parte West*, 1 Br. C. 575; *Crowder* v. *Stone*, 3 Rus. 217; *Bright* v. *Rowe*, 3 M. & K. 316; *Gibbons* v. *Langdon*, 6 Sim. 260; *Macgregor* v. *Macgregor*, 2 Col. 192; *Barker* v. *Lea*, T. & R. 413; the rule, however (which generally contradicts the intention of the testator), may be excluded by the context showing a clear intention to the contrary, *Eyre* v. *Marsden*, 2 Ke. 564; 7 L. J. Ch. 220; *Leeming* v. *Sherratt*, 2 Ha. 14; 11 L. J. Ch. 423; *Goodman* v. *Goodman*, 1 De G. & S. 695; 17 L. J. Ch. 103; or by showing a clear intention that the fund in question is an "aggregate fund"

designed to be kept together, *Worlidge* v. *Churchill*, 3 Br. C. 465; *Douglas* v. *Andrews*, 14 Be. 347; *Dutton* v. *Crowdy*, 33 Be. 272; 33 L. J. Ch. 241. And see *Re Jarman's Trusts* L. R. 1 Eq. 71, as to separate use attaching to accrued as well as original shares.

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Obscurity as to the period to which survivorship refers, especially where the nature of the devise is such as to present a point of time other than the death of the testator to which it may by possibility be construed as referring, has produced numerous and conflicting decisions. In the case, for instance, of a gift "to A. for life, and after his decease to B., C., and D., as tenants in common, and the survivors and survivor of them, their or his heirs and assigns," if either of the remaindermen dies in A.'s lifetime, the question necessarily arises whether the testator means survivors at his own death or at the death of the tenant for life.

To what period survivorship refers.

Cripps v. *Wolcott*, 4 Mad. 11, decided that if there is no previous interest given in the legacy, then the time at which survivorship is to be ascertained is the death of the testator, and the survivors at his death will take the whole legacy. But if a previous life estate is given, then the time at which survivorship is to be ascertained is the death of the tenant for life, and the survivors at such death will take the whole legacy, thus making the time for ascertaining survivorship correspond with the period of division of the fund. And in *Re Gregson's Trusts*, 2 D. J. & S. 428; 34 L. J. Ch. 41, it was held that the rule laid down in *Cripps* v. *Wolcott* applies to real as well as personal estate.

See as to exceptions to the rule, *Re Poultney*, [1912] 2 Ch. 541; 81 L. J. Ch. 748; Hawkins, Constr. Wills, 312. And see Jarm. Wills, ch. 55—iii.

No. XVII.

PREC. 17.

WILL *of a* MARRIED MAN, *providing for a Wife and for Adult and Infant Children.—Appointment of Executors and Guardians.—Devise to Wife during Widowhood of Freehold Dwelling-house, with the use of the Furniture, &c.—Devise of other Freehold Property on Trust for Sale and to Divide between Two Sons, subject to a Charge in aid of the Personal Estate.—Devise of other Freehold Property, in favour of a Married Daughter, for life inalienably, and her Issue, and ultimately upon the Trusts declared of the Residuary Real Estate.—Residue of Real and Personal Estate vested in Trustees for Conversion into Money, with discretionary Power to postpone Conversion, and Direction as to Unconverted Estate; Produce, subject to a Provision for Wife by way of Annuity (reducible on Marriage), given to Children equally; each Child's Share settled on protective trusts for such Child for Life and his or her Issue, with Power of appointing a Life Interest to a*

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Husband or Wife, with an ultimate Trust in favour of the other Children and their Issue, &c.—Power to appoint Trustees.

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Appointment of executors, trustees and guardians.

2. I APPOINT my friends [*names &c.*] to be executors and trustees of this my will and trustees thereof for the purposes of the Settled Land Act 1925 and I APPOINT them to be guardians of my children during their respective minorities (*a*).

Wines, &c., to wife.

3. I BEQUEATH to my wife [*name*] absolutely all the wines liquors fuel and other consumable stores and provisions which shall belong to me at my death.

Devise of freehold house, with use of furniture, &c., to wife during widowhood.

4. I DEVISE AND BEQUEATH the freehold messuage with the offices gardens and appurtenances belonging thereto at —— aforesaid now in my own occupation together with the use and enjoyment therein of the furniture (*b*) pictures prints musical instruments plate linen china glass and other household effects not hereinbefore bequeathed which shall be in or about the same at my death to my wife [*name*] during her life if she shall continue my widow she insuring and keeping the same insured against loss by fire to the full value [*or* to three-fourths of the value] in the names of my trustees and also keeping the same in good repair and condition reasonable wear and tear excepted

Inventory of furniture, &c., to be taken.

AND I DIRECT that my trustees shall cause an inventory to be taken of the chattels comprised in the preceding bequest and two copies to be made thereof and signed by my wife and my trustees before the delivery of such chattels to her one of such copies to be delivered to her and the other to be kept by them.

Devise of freehold estates to two sons in common in fee, charged with a sum of money to be paid to trustees in aid of the personal estate.

5. I DEVISE my warehouse adjoining my dwelling-house and my four cottages now in the several occupations of [*names*] all which hereditaments are situate at —— aforesaid also the said freehold messuage or dwelling-house now in my own occupation with the offices gardens and appurtenances thereunto belonging (but subject as to the last-mentioned messuage and premises to the estate of my wife therein under the devise hereinbefore contained) UNTO my trustees hereinbefore named upon trust that my trustees shall sell the same and raise thereout the sum of £—— sterling with interest for the same after the rate of four per centum per annum from my death and apply the same as part of my personal estate and hold the residue of the proceeds of sale upon trust to divide the same amongst my sons [*name*] and [*name*] as tenants in common in equal shares.

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6. I DEVISE my freehold messuages with the out-buildings and gardens thereunto belonging and the closes of land held therewith situate at —— now in the occupation of [*names*] Unto my daughter [*name*] the wife of [*name*] during her life without power of anticipation and from and after her death to her present or any future husband (*c*) who may survive her and to whom she shall appoint the same by will for his life or for any estate or interest determinable on or before his death [*or* and to whom my said daughter by any deed or deeds with or without power of revocation and new appointment or by her will shall appoint the said hereditaments or any part thereof for his life in remainder expectant upon the death of my said daughter or for any less estate or interest] AND after the death of my said daughter and the failure or determination of the life or other interest of a husband so appointed by her as aforesaid I DEVISE the same hereditaments to my trustees hereinbefore named upon trust that my trustees shall sell the same and hold the net proceeds of sale upon such trusts for the benefit of all or any one or more of the children and other issue of my said daughter (such other issue to be born in her lifetime) as she by any deed or deeds with or without power of revocation and new appointment or by her will shall appoint And in default of and subject to any such appointment upon trust for such of her children as shall attain the age of twenty-one years or marry if more than one in equal shares but so that no child in whose favour or in favour of whose issue an appointment shall be made shall participate in the unappointed property without bringing the benefit of such appointment into hotchpot and subject to the trusts aforesaid the same shall fall into and form part of my residuary estate (*d*).

Devise of other freehold estates to trustees, for the life of a married daughter, on special trusts for her separate and inalienable use;

—with power for her to appoint a life interest to any husband;

[another form;]

—to her children, as she shall appoint;

—for her children in common attaining 21 or marrying;

—and upon the trusts of the residuary estate.

7. I DECLARE that the respective devisees of my real estates hereinbefore specifically devised shall be entitled to the whole of the rents accruing due at my death without any apportionment of such rents in favour of my executors.

8. I DEVISE all the real estate not hereinbefore devised to which I shall be entitled or over which I shall have any disposing power at my death and I BEQUEATH the residue of the personal estate to which I shall be then entitled (including the furniture and effects whereof the use and enjoyment are hereinbefore given to my wife subject to her interest therein under such gift) UNTO my trustees hereinbefore named UPON TRUST that my trustees shall sell my said real estate and so much of my said residuary personal estate as shall be of a saleable nature (*e*) and get in the rest of my residuary personal estate and dispose of the net moneys to arise from such real estate and residuary personal

Residue of real and personal estate to trustees;

—to sell and convert;

—to invest surplus, after paying debts, &c.

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estate after payment thereout of my debts and my funeral and testamentary expenses and the expenses incident to the execution of the preceding trust according to the trusts hereinafter declared concerning the same Nevertheless I give to my trustees discretionary authority to postpone the sale of all or any part of my residuary real estate and the getting in of such parts of my residuary personal estate as shall consist of stock funds shares or securities of any description whatever for such period as to them shall seem expedient [*or* until some person beneficially entitled in possession to a share of the trust premises shall in writing require the sale and getting in thereof] But I declare that from the time of my decease the unsold real estate and outstanding personal estate shall be subject to the trusts hereinafter declared concerning the net said moneys and the rents interest and yearly produce thereof shall be deemed annual income for the purposes of such trusts and such real estate shall be transmissible as personal estate and be considered as converted in equity And I DIRECT my trustees to stand possessed of the net moneys to arise as aforesaid UPON TRUST thereout in the first place to pay unto my wife an annuity of £—— during her life by equal quarterly payments the first of such payments to be made at the expiration of three calendar months from my death But I direct that in the event of my wife marrying again the said annuity of £—— shall be reduced to an annuity of £—— such reduced annuity to be payable quarterly and the first reduced payment to be made on the quarterly day of payment which shall happen next after the marriage of my widow AND I EMPOWER my trustees if they shall think fit out of the same trust-moneys to appropriate and invest upon some suitable authorised investment a sum sufficient at the period of appropriation as a fund for answering the said annuity to my wife And I declare that from and after such appropriation the residue of the same trust-moneys shall be liberated from the trust for payment of the said annuity but the appropriated fund shall (without prejudice to the said annuity) be subject to the trusts hereinafter declared concerning the same trust-moneys And subject to the trust aforesaid UPON TRUST to divide the same trust-moneys among all my children in equal shares But subject to the trusts following (namely) As to the yearly income of the share of each child of mine on protective trusts as declared by section 33 of the Trustee Act 1925 for the benefit of such child for the period of his or her life (*f*) And as to the capital of the share of each child of mine and the yearly income thereof to accrue due after his or her decease UPON SUCH TRUSTS for the benefit of all or any one or more of the children and other issue

Discretionary power to postpone the sale and conversion;

—the unconverted estate to be subject to the trusts declared of the produce.

Trusts of the residuary funds;

—to pay annuity to wife for life,

reducible on her marrying again.

Fund to be set apart for answering the annuity in exoneration of the general fund;

—to divide the fund among children equally;

protective trusts of the share of each child;

—children and issue, as parent shall

of my same child (such other issue to be born in his or her lifetime) as my same child by any deed or deeds with or without power of revocation and new appointment or by his or her will or codicil shall appoint And in default of such appointment IN TRUST for my grandchild if only one or my grandchildren equally if more than one issue of my same child but on the death of each grandchild who being a son shall die under the age of twenty-one years or being a daughter shall die under that age without having been married as well the share originally given as the shares accruing under this cross executory trust to such grandchild shall accrue to the other grandchildren equally or to the other grandchild but no grandchild in whose favour an appointment shall be made under the power last aforesaid shall participate in the unappointed fund without bringing the appointed interest into hotchpot And if no grandchild being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then IN TRUST for my other children in equal shares.

by deed or will appoint; —children equally with benefit of accruer; —testator's other children equally.

9. I EMPOWER each child of mine by his or her will or codicil to appoint to or in favour of his or her wife or husband the whole or any part of the yearly income of his or her share for the life of such wife or husband or for any interest determinable on or before the death of such wife or husband.

Power for child to appoint a life interest to a husband or wife.

10. I DIRECT my trustees to invest the share of each child of mine in the names of my trustees in some authorised trust investment (*g*) but while any trust of the income of such share shall be subsisting for the life of such child or of his or her wife or husband the statutory power to vary investments shall not be exercised without the previous consent in writing of the person on whose death such trust shall be determinable unless such person shall be an infant [*or* but during the life of such child being adult the statutory power to vary investments shall not be exercised without his or her previous consent in writing].

Direction as to investment of children's shares.

11. I SUBJECT the share or shares which under the ultimate trusts hereinbefore declared concerning the original share of each of my children each or any other child of mine shall eventually take to all the trusts and provisions herein contained concerning the original share of such other child inclusively of this clause.

Shares accruing subjected to trusts of original shares.

12. I DECLARE that if any child of mine shall die in my lifetime and any issue of such child shall be living at my death then the shares as well accruing as original to which the child so dying would if living at my death have been entitled under the trusts aforesaid shall be held by my trustees upon such trusts and subject to such provisions as the same would have been held if such child had died immediately after my death.

Proviso for case of child dying before testator and leaving issue.

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Power to appoint new trustees.

13. I DECLARE that it shall be lawful for such child or children of mine as shall for the time being be living and of the age of twenty-one years or the greater number of such children if any and if there shall not be any such child then for my wife during her widowhood to appoint new trustees of this my will.

14. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 17.

(*a*) See note (*a*) to Prec. 5, and note (*f*) to Prec. 12.

(*b*) See note (*a*) to Prec. 8.

(*c*) The decision in *Re Park's Settlement*, [1914] 1 Ch. 595; 83 L. J. Ch. 528, seemed to require that the power should be restricted to an appointment in favour of a living husband. But the decision in that case was not followed, *Re Bullock's Will Trusts*, [1915] 1 Ch. 493; 84 L. J. Ch. 463; *Re Garnham*, [1916] 2 Ch. 413; 85 L. J. Ch. 646. And now see sect. 161 of the Law of Property Act, 1925.

Devolution of legal estate under a settlement of land.

(*d*) Where, after 1925, a testator settles land by a devise to A. for life, with remainder to B. for life, with remainder to the trustees of the will on trust for sale, the legal estate in the property will devolve as follows: On the death of the testator it will vest in his executors (Administration of Estates Act, 1925, s. 1). The executors will, subject to their rights under sect. 8 (3) of the Settled Land Act, 1925, hold the land on trust, if and when required so to do, to convey it to A. (Settled Land Act, 1925, s. 6 (*b*)). On the death of A. before B., A.'s special executors, if he left a will, who will be the trustees of the settlement made by the original will (Administration of Estates Act, 1925, s. 22 (1); Settled Land Act, 1925, s. 30 (i) (ii) or (iv), or, if A. dies intestate, then the trustees of the settlement made by the original will, if willing to act as administrators (Supreme Court of Judicature (Consolidation) Act, 1925, s. 162), or, if not so willing to act, the administrator of A. will hold the land on trust, if and when required so to do, to convey it to B. (Settled Land Act, 1925, s. 7 (1)). On the death of the survivor of A. and B. the personal representatives of the survivor (*i.e.* special executors, or administrator as in the case of A.) will hold the land on trust, if and when required so to do, to convey it to the trustees for sale as joint tenants (Settled Land Act, 1925, s. 7 (5)). In each case an assent in writing will operate as a conveyance (Settled Land Act, 1925, s. 8 (1)), and until conveyance the life tenant cannot effectively exercise his powers (Settled Land Act, 1925, s. 13). If the trusts of the land, after the life interests, were for persons in undivided shares, a trust for sale would arise under sect. 36 of the Settled Land Act, 1925.

(*e*) Sect. 12 of the Trustee Act, 1925, confers on trustees for sale powers as to manner of sale, conditions as to title, rescission, &c. Under sect. 25 of the Law of Property Act, 1925, they will be able to postpone sale of land, and under sect. 28 have powers of management meantime.

(*f*) See note (*r*) to Prec. 11, *ante*, p. 207.

(*g*) See note (*b*), Prec. 4.

No. XVIII.

PREC. 18.

WILL *of a* MARRIED MAN *disposing of Real and Personal Estate in favour of his Wife and Children.—Appointment of Executors and Guardians.—Devise of Part of the Real Estate for Testator's Children; of other Part for a married Daughter and her Husband successively for Life, and her Children; of other Part for a Son and his Wife successively for Life, and their Children; of other Part to a Son for life, then to his Sons successively, by way of Executory Devise, with a Limitation over to his Daughters; of other Part to Testator's Wife during Widowhood, then to Trustees for Sale, with Power to concur with the Wife in a Sale.—Devise of Residue of Freehold and Leasehold Estate to Trustees for Sale.—Permission to Wife to occupy Dwelling-house, &c., during Widowhood; Specific and Pecuniary Bequests to Wife.—Bequests of Residuary Personal Estate to Trustees to be converted with particular Powers and Provisions applicable to Contingent and Reversionary Property, Annuities and other determinable Investments.—Produce of Residuary Real and Personal Estate to be invested, and Income paid to Wife during Widowhood; Capital to Children equally to vest as to sons at Twenty-one and as to daughters at Twenty-one or Marriage.—Ultimate Trust (subject, as to Part, to Wife's Appointment) for Testator's Brothers and Sisters, and their Issue per Stirpes.—Provision for letting in the Families of Testator's Children dying in his Lifetime.—Settlement of Daughters' Shares upon them and their Issue, but so as to postpone, as far as may be, the Vesting till Twenty-five; with a special Provision for their Protection, and a Power to appoint Life Interests to Husbands.—Annuity to Wife marrying again.—Power to appoint Trustees.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT my friends [*names &c.*] to be executors and trustees of this my will and trustees thereof for the purposes of the Settled Land Act 1925 and I APPOINT them to be guardians of my children during their respective minorities (*a*).

Appointment of executors, trustees and guardians.

3. I DEVISE all the freehold hereditaments in the parish of

Devise to eldest son.

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—— in the county of —— to which I am entitled at the date of this my will To my eldest son [*name*] in fee simple.

Devise in trust for testator's children in common with cross executory trusts.

4. I DEVISE my freehold closes called —— containing respectively —— or thereabouts situate at —— to my wife [*name*] for her life without impeachment of waste and from and after her death I devise the same to my trustees hereinbefore named upon trust that my trustees shall sell the same and invest the net proceeds of sale and hold such investments in trust for such of my sons and daughters [*names*] as shall attain the age of twenty-one years or marry [*or* or die under that age leaving issue] in equal shares as tenants in common if more than one But I declare that the shares original and accruing of each daughter of mine shall be retained by my trustees upon trust during the life of such daughter to pay the income of such shares as and when the same shall become due and not by way of anticipation into her own hands to be enjoyed by her as an inalienable personal provision and after her death such shares and the future income thereof shall be held in trust for such persons for such interests and in such manner as she shall by any testamentary writing appoint and in default of appointment for her absolutely and I declare that if during the life of my same daughter the income of her share or shares or any part thereof shall from any cause whatever cease to be enjoyed by her as aforesaid then all the dispositions in her favour hereinbefore contained shall be void and the trust hereinbefore declared for my said sons and daughters shall thenceforth take effect in the same manner as if such daughter ceasing to enjoy the income of her share or shares had never existed as an object thereof.

Devise to trustees for the life of testator's married daughter, subject to cesser on alienation—to her husband for life with remainder in trust for her children attaining twenty-one, or dying under twenty-one, leaving issue—for sons of testator in common.

5. I DEVISE the freehold messuage and lands which at the date of this my will constitute the farm called —— farm situate in the parish of —— in the county of —— to my daughter [*name*] the wife of [*name*] for her life without impeachment of waste And I declare that if at any time during the life of my last-mentioned daughter the same hereditaments or any part thereof shall from any cause whatever cease to be enjoyed as aforesaid then the devise lastly hereinbefore contained in her favour shall thenceforth be void and the same hereditaments shall during the then remainder of her life go to the person or persons who would for the time being be entitled if my same daughter were dead With remainder to her husband the said [*name*] for his life without impeachment of waste And from after the death of the survivor of my said daughter [*name*] and her said husband [*name*] I DEVISE the same hereditaments to my trustees hereinbefore named upon trust that my trustees shall sell the same and invest the net proceeds of sale thereof and

hold the said investments in trust for such child or children of my last-mentioned daughter as shall attain the age of twenty-one years or die under that age leaving issue living at his her or their deaths And if more than one as tenants in common in equal shares And if there shall not be any child of my same daughter who shall attain the said age or shall die under that age and (*b*) leave issue living at his or her death Then for such persons for such interests and in such manner as my same daughter shall by any testamentary writing appoint And in default of appointment for my sons [*names*] as tenants in common in equal shares absolutely.

Devise to testator's son for life, remainder to son's wife for life—to their issue, as they or the survivor shall appoint—to their children with cross executory trusts;—to the survivor of the son and his wife.

6. I DEVISE all my freehold hereditaments at —— in the county of —— which were purchased by me from [*name and description of vendor*] and were conveyed to me by indenture dated the —— day of —— 19— To my son [*name*] for his life without impeachment of waste With remainder to [*name*] the wife of my same son for her life without impeachment of waste And from and after the death of the survivor of them I DEVISE the same hereditaments to my trustees hereinbefore named upon trust that my trustees shall sell the same and invest the net proceeds of sale thereof and hold such investments in trust for such one or more exclusively of the children and more remote issue of my same son (such issue coming into being in the lifetime of my same son and [*name*] his wife or the survivor of them) for such interest or interests in such shares subject to such trusts and in such manner in all respects as my same son and his said wife or the survivor of them by any deed or deeds with or without power of revocation and new appointment or as such survivor by any testamentary writing shall appoint And in default of and subject to any such appointment in trust for such of the children of my same son as shall attain the age of twenty-one years or die under that age leaving issue living at his or her death if more than one as tenants in common in equal shares but so that no appointee under the aforesaid power of appointing to children and issue shall participate in the unappointed fund without bringing the appointed share or interest into hotchpot And in case there shall not be any child of my same son or not any such child who shall attain the age of twenty-one years or die under that age and leave issue living at his or her death then in trust for the survivor of them my same son and his said wife absolutely.

Devise to testator's first son for life—to the sons of such sons suc-

7. I DEVISE all the manors messuages lands and hereditaments in the county of —— to which I shall be entitled at my decease To my first son for his life With remainder to the first son of my first son in fee simple And if such first son of my

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cessively, by way of executory devise—to the daughters in common —to testator's second and other sons, and their sons and daughters, in like manner.

first son shall die under the age of twenty-one years without leaving issue [male] living at his death To the second and every subsequent son of my first son successively according to seniority in fee simple so that the estate of such second and each subsequent son shall in the event of his death under the age of twenty-one years without leaving issue [male] living at his death be divested and go over to his next brother And if there shall not be any son of my first son or not any who shall attain the age of twenty-one years or die under that age and leave issue [male] living at his death then to the daughter or daughters of my first son in fee simple and if more than one as tenants in common in equal shares (*c*) And if any of such daughters shall die under the age of twenty-one years without leaving issue living at her or their death or respective deaths then as to the share or shares original and accruing of the daughter or daughters so dying To the other or others of the daughters of my first son in fee simple and if more than one as tenants in common in equal shares And if there shall not be any daughter of my first son or not any such daughter who shall attain the age of twenty-one years or die under that age and leave issue living at her death To my second and every subsequent son for his life with remainders to his sons and daughters corresponding with the remainders hereinbefore limited to the sons and daughters of my first son but so that every elder of my second and subsequent sons and his sons and daughters shall be preferred to every younger of my same sons and his sons and daughters And if there shall not be any child of any of my sons or not any such child who shall attain the age of twenty-one years or die under that age and leave issue living at his or her death then to the person who would under the general law in force immediately before the coming into operation of the Law of Property Act 1925 have answered the description of my heir (*d*).

Devise to wife during widowhood—remainder to trustees, upon the trusts after declared of the other real estate.

8. I DEVISE all the freehold hereditaments at —— in the county of —— which I lately purchased from the devisees in trust of [*name*] To my wife [*name*] during her life if she shall continue my widow without impeachment of waste And after her death or marrying again To [*names of trustees*] in fee simple upon the trusts hereinafter contained concerning the residue of my freehold estates.

9. I DECLARE that the rents of the hereditaments hereinbefore specifically devised which shall be current or accruing at the time of my death shall not be apportioned (*e*).

Devise of freehold and leasehold

10. I DEVISE the residue of the freehold estates and all the leasehold estates to which I shall be entitled at my death unto

the said [*names of trustees*] UPON TRUST that my trustees shall sell the same And I direct that the money to arise from the sale of my said estates shall be received by my trustees and after payment of my debts and funeral and testamentary expenses the residue thereof shall be disposed of in a manner hereinafter expressed.

estates to trustees, upon trust to sell.

11. I DECLARE that notwithstanding the postponement of the sale of my said estates or any of them the same shall for the purposes of enjoyment and transmission be considered as converted in equity from the time of my death but without prejudice to the right of the person or persons becoming absolutely entitled to the entire produce thereof to treat the same as unconverted and requiring a conveyance thereof.

Real estates till sold to be considered as personal.

12. I DECLARE that notwithstanding the trust for sale hereinbefore contained my trustees shall permit my wife to have the use and occupation of the freehold messuage or dwelling-house with the offices gardens orchards pleasure-grounds and lands belonging thereto at —— aforesaid which at the date of this my will are in my own occupation (in exclusion of any hereditaments of mine which subsequently to that date may be occupied by me) as her residence so long as she shall think fit to reside therein and shall continue my widow she keeping the same insured against fire to the full value thereof [*or* to three-fourths of the value thereof] in the names of my trustees and also keeping the same in tenantable repair and paying the taxes and other outgoings affecting the same AND I DIRECT that the trust for sale of the last-mentioned premises shall be suspended until the right of my said wife to the use and occupation thereof shall determine.

Trustees to permit wife to reside in dwelling-house, during widowhood.

13. *Bequest to wife of furniture and personal effects as in Prec.* 8, *clause* 3, *omitting* "plate and plated articles" *and adding* "except plate and plated articles."

14. *Immediate legacy to wife as in Prec.* 6, *clause* 3.

15. I GIVE all the plate and plated articles which shall belong to me at my death unto the said [*names of trustees*] UPON TRUST that my trustees shall permit my wife so long as she shall continue my widow to have the personal use and enjoyment thereof And subject thereto IN TRUST for such child or children of mine as shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married and if more than one to be divided between them in shares as nearly equal as may be by my trustees whose division shall be conclusive And I direct my trustees as soon as may be after my death and before the delivery to my wife of the said

Bequest of plate upon trust to permit wife to have the use;

an inventory to be made.

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plate and plated articles to cause an inventory thereof to be taken and two copies to be made of such inventory and to be signed by my trustees and my wife one copy to be kept by them and the other by her and my trustees shall after the signature of such copies and the delivery to my wife of the said plate and plated articles be exempt from all responsibility in respect therof during her widowhood.

Bequest of residue of personal estate upon trust to convert.

16. I BEQUEATH the residue of the personal estate to which I shall be entitled at my death unto the said [*names of trustees*] UPON TRUST that my trustees shall sell convert collect and get in the same And I DECLARE that if any real or personal estate hereinbefore directed to be sold or converted shall consist of reversionary future or contingent interests my trustees shall be at liberty in their discretion either to await the falling in or the vesting of such interests or to sell the same or to concur with the person or persons entitled to the prior interest or interests in any arrangement for dividing the corpus of the property or for selling or converting the same and for apportioning the produce according to the value of the respective interests or otherwise providing for such interests.

Power to defer the sale of reversionary and contingent interests.

Power to continue determinable investments.

17. I DECLARE that my trustees shall have full discretionary power to permit any part of my personal estate which shall at my death consist of life annuities or other determinable interests or of mortgages stocks funds shares in public companies or securities including personal securities or any other species of investment yielding interest or income to remain in the same state of investment for such period or periods as my trustees shall think fit.

The actual yearly produce of the real and personal estate, whether more or less than the rule of equity allows, to be deemed income.

18. I DECLARE that the actual yearly produce of my freehold and leasehold estates and of my residuary personal estate respectively until the sale and conversion thereof respectively shall be considered as the income thereof for the purposes of the trusts and provisions hereinafter contained and be applied accordingly whether the same shall be more or less in amount than the produce or value of the estates would have yielded if invested conformably to the trust for investment herein contained and so that nothing shall be placed on the one hand to the account of capital in respect of the proceeds arising from determinable or extraordinary investments or on the other hand to the account of income in respect of reversionary or contingent interests or other unproductive investments any rule of equity to the contrary notwithstanding [*Or* I DECLARE that in the meantime until the conversion and investment of my real and personal estates pursuant to the trusts hereinbefore contained my trustees shall have full discretionary power to adjust and determine all

[*Or*, power to trustees to determine the rights of tenant for life and

rights and equities as between tenant for life and reversioner or otherwise in regard to capital and income upon such principles and in such manner as to my trustees shall seem just and reasonable with liberty to apply as income the whole amount of the actual proceeds and profits of such real and personal estate or any part thereof or to apply as income part only of such proceeds and profits and invest the residue thereof as capital but so that the income to be received by the tenant for life shall not be less than the rules of equity allow].

reversioner, in regard to capital and income.]

19. I DIRECT that both as to the money (not applicable as income under the direction hereinbefore contained) to arise from my residuary personal estate and as to the money to arise from the sale of my freehold and leasehold estates my trustees shall hold the same UPON TRUST with the consent in writing of my wife during her life if she shall continue my widow and after her death or marriage in the discretion of my trustees to invest the same in their names in manner hereinafter authorised AND UPON FURTHER TRUST to permit my wife to receive the income of the trust fund constituted of such moneys or of the investment thereof during her life if she shall continue my widow And after the determination of that trust as to the principal of the said trust fund with the future income thereof IN TRUST for my child if only one or my children if more than one in equal shares and so that the interest of each son shall be absolutely vested at the age of twenty-one years and of each daughter at that age or marriage whether the preceding trust shall have determined or not and so that the share as well accruing as original of a son dying under the age of twenty-one years and of a daughter dying under that age without having been married (*f*) shall accrue to the other or others of my children and if more than one in equal shares and be vested as aforesaid nevertheless as to the shares of daughters subject to the trusts hereinafter contained And if there shall not be any object of the preceding trust who shall acquire an absolutely vested interest UPON TRUST to dispose of one moiety of the said trust fund to or for such persons and purposes and in such manner as my wife if she shall continue my widow shall by her will appoint [*or* UPON TRUST to raise and pay out of the said trust fund such sum or sums of money not exceeding in the whole the sum of £—— as my wife if she shall continue my widow shall by her will direct to and for such persons and purposes and in such manner as she shall thereby direct] and as to the said trust fund subject to the power lastly hereby given to my wife IN TRUST for such of the class of persons following (namely) my brothers and sisters living at my death [*or* at the marriage or death of my wife] and the issue then

Trusts of the produce of the real estate and residuary personal estate;

—to invest;

—to permit wife to receive income during widowhood;

—capital for testator's children equally, with benefit of accruer.

Ultimate trust, as to a moiety [*or* as to a limited sum] for such persons as wife shall by will appoint; and subject to such power, the whole for testator's brothers and sisters, and their issue living at testator's [*or* wife's] death, *per stirpes*.

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living of my brothers and sisters dying in my lifetime [*or* dying in my lifetime or during the widowhood of my wife] as being males shall attain the age of twenty-one years or being females shall attain that age or be married distributively yet so that the issue whether children or remoter issue shall take by substitution and if more than one as tenants in common in equal shares the share which their respective parent would have taken had such parent survived me and attained a vested interest.

Widows and issue of sons, and issue of daughters, dying in testator's lifetime, to succeed to the shares of the deceased.

20. I DECLARE that if any child of mine being a son and having attained the age of twenty-one years shall die in my lifetime leaving a widow or a child or children or both living at my death or if any child of mine being a daughter and having been married with my consent shall die in my lifetime leaving a child or children living at my death then the fund or share which under the aforesaid trust in favour of my children would have belonged to the child of mine so dying if such child had lived to become an object of and acquire an absolutely vested interest under the same trusts shall be held by my trustees upon trusts and subject to provisions in favour of the widow or the child or children or in favour of the widow and child or children as the case may be of the child of mine so dying corresponding with the trusts and provisions herein contained of and with respect to the said trust fund constituted as last aforesaid in favour of my wife or child or children or of my wife and child or children as the case may be and on failure of such trusts and provisions shall be disposable in the same manner as if this declaration had not been inserted (*g*).

Protective trusts of shares of daughters;

—capital for their children or more remote issue, as they shall appoint;

—in default of appointment, for their children equally, with accruer; but so as to postpone the vesting beyond the usual period;

21. I DECLARE that my trustees shall retain the fund or the share or shares original and accruing to which each or any daughter of mine acquiring an absolutely vested interest shall become entitled by virtue of my will UPON TRUST to hold the income thereof on protective trusts as declared by section 33 of the Trustee Act, 1925, for the benefit of my same daughter for the period of her life And after the death of my same daughter then as to the principal with the future income IN TRUST for all or any of the issue of my same daughter including grandchildren and more remote issue born in her lifetime for such interests in such proportions and in such manner in all respects as my same daughter shall by deed or will appoint And in default of such appointment IN TRUST for the child if only one or all the children equally if more than one of my same daughter so that the interest or interests of such child or children shall be absolutely vested at the age of twenty-five years or such earlier age as such child or children respectively shall happen to have attained at the

death of the survivor of my children and grandchildren who shall be living at the time of my death and the expiration of the term of twenty-one years afterwards (*h*) whether the preceding trusts be determined or not and so that the share as well accruing as original of any child dying without having attained either of the alternative ages aforesaid shall accrue to the others or other of such children and if more than one in equal shares and be vested as aforesaid But no child in whose favour an appointment shall be made shall participate in the unappointed fund without bringing the appointed interest into distribution And if there shall not be any object of the preceding trust who shall acquire an absolutely vested interest Then IN TRUST for such persons or purposes and in such manner as my same daughter being discovert shall by deed or will or being covert shall by her will appoint And in default of appointment IN TRUST for such person or persons as would by law have become entitled to the said trust premises at her death had she been absolutely entitled thereto and died intestate a spinster and domiciled in England such persons if more than one to take the shares which they would have taken by law [*or* upon such trusts as would by virtue of my will affect the same share or shares if my same daughter were dead without having acquired an absolutely vested interest therein under the trusts aforesaid] AND I EMPOWER my same daughter by her will to appoint all or any part of the income of the same share or shares to be paid to any husband (*i*) who shall survive her for his life.

if no child, for such persons as daughters shall appoint;

—in default of appointment, for their next of kin,

[*or*, upon the trusts affecting the residue of the fund].

Power to appoint interest to husband.

22. I DIRECT my trustees if my wife shall marry again to pay to her a clear annuity of £—— during her life by equal half-yearly payments without power of anticipation as a separate and inalienable provision the first payment to be made at the end of six calendar months next after her marriage. And I direct my trustees to set apart in their names out of my trust fund and invest upon some authorised investment a sum sufficient at the time of appropriation to answer the same annuity which sum and the investments representing the same shall subject to the payment of such annuity be held upon the trusts affecting the residue of the said trust fund. And after setting apart the said sum my residuary estate shall be released from the said annuity.

Annuity to wife marrying again, to be secured by setting apart a sum.

23. I DECLARE that a new trustee or trustees of my will may from time to time be appointed by my wife during her widowhood and subject as aforesaid in the manner prescribed by law (*k*).

24. *Investment clause.* See note (*b*) to Prec. 4.

25. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES TO PREC. 18.

NOTES to Precedent 18.

(*a*) See note (*a*) to Prec. 5, and note (*f*) to Prec. 12.

"And" and "or."

(*b*) In these and similar limitations great care is necessary in the use of the conjunctions "and" and "or"; difficulties are continually arising from their indiscriminate application, and accordingly we find the Courts have often been called upon to rectify blunders of this nature. It would seem that, to induce the Courts to read "or" for "and," or *vice versa*, there must be shown some sort of necessity, something beyond mere probability that the testator's own words do not indicate his real intention. The change must be made for the purpose of correcting a palpable mistake; or of avoiding an absolute absurdity; or of reconciling a contradiction or clear inconsistency; or of escaping from an uncertainty or ambiguity; or otherwise of giving effect to an indisputable intention—and cannot be made if any reasonable construction can be put upon the testator's words as they stand, *Re Hopkins's Trust*, 2 H. & M. 411, 415. The cases on this subject are collected, Jarm. Wills, 604 *et seq.* See also *Re Crutchley*, [1912] 2 Ch. 335; 81 L. J. Ch. 644.

(*c*) After 1925 a devise to tenants in common will operate as a devise to the Settled Land Act trustees or, if none, to the personal representative upon trust for sale, Law of Property Act, 1925, sects. 34 (3) and 35.

(*d*) See sects. 131 and 132 of the Law of Property Act, 1925.

(*e*) See note (*f*), Prec. 8.

"Unmarried," meaning of.

(*f*) There is an ambiguity in the use of the word "unmarried" which has been the cause of frequent litigation. The ordinary and primary meaning of the word is "never having been married," *Dalrymple* v. *Hall*, 16 Ch. D. 715; 50 L. J. Ch. 302; *Re Sergeant*, 26 Ch. D. 575; 54 L. J. Ch. 159; the less accustomed meaning is "not being married at the time in question." It would seem that the word is to be construed in one sense or the other according to the particular circumstances of each case, *Maugham* v. *Vincent*, 9 L. J. Ch. 329; a doctrine which, supposing the first construction rejected, still leaves room for dispute as to the particular epoch to which the testator intended the word "unmarried" to refer, *Hall* v. *Robertson*, 4 D. M. & G. 781; 23 L. J. Ch. 241. It needs but a slight indication of intention to give the word its secondary instead of its primary meaning, *In re Sergeant, ubi sup.* See also *Re Lesingham's Trusts*, 24 Ch. D. 703; 53 L. J. Ch. 333, where the words obtained in their secondary meaning, and *Re Chant*, [1900] 2 Ch. 345; 69 L. J. Ch. 601; followed in *Re Jones*, [1915] 1 Ch. 246; 84 L. J. Ch. 222; *Re Hall-Dare*, [1916] 1 Ch. 272; *Re Ellis's Settlement Trusts*, [1921] 1 Ch. 230; 90 L. J. Ch. 165. Refer also to Jarm. Wills, 1284. As to the meaning of "married," see *Rudall* v. *Nichols*, [1900] W. N. 133.

As to providing against lapse.

(*g*) Wills are commonly framed upon the assumption that the state of circumstances existing at the time of execution will remain unchanged until the testator's decease; hence the infrequency of any provision against lapse. It is true that the event of the gift lapsing would, in most cases, be best met by a new will or a codicil, adapted to the change of circumstances; yet, as the testator may be prevented from revising his disposition or be unapprised of its partial failure, a prospective provision, if it should not be exactly suited to the exigency, may still obviate much of the inconvenience and hardship of the case. For instance, it sometimes happens that one of the objects of the testator's bounty dies, leaving issue, upon whom the testator might wish to confer

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the benefit intended for their parent, *Re Gresley's Settlement*, [1911] 1 Ch. 358; 80 L. J. Ch. 255; *Re Clunies-Ross*, 106 L. T. 96; *Re Greenwood*, [1912] 1 Ch. 392; 81 L. J. Ch. 298; and see *Re Smith*, [1916] 2 Ch. 368; 85 L. J. Ch. 657; *Re Young*, [1920] 2 Ch. 427; 89 L. J. Ch. 614; his death may happen when the testator is *in extremis*, so as to be incapable of altering his will, or may happen at a distance remote from the testator, so that tidings of the event do not reach him before his own death. The case, however, of issue of the testator himself dying in his lifetime, and in his will referred to by name (or otherwise individually and not as one of a class), is now provided for, see Wills Act, s. 33, *ante*. The testator and his legatee have sometimes died in circumstances which raised the nice and difficult point respecting probable or presumed survivorship, as where they both perished on board a ship foundering at sea, see *Mason* v. *Mason*, 1 Mer. 308; *Underwood* v. *Wing*, 4 D. M. & G. 633; 24 L. J. Ch. 293. In *Elliott* v. *Smith*, 22 Ch. D. 236; 52 L. J. Ch. 222, where testator and legatee both died in a collision of steam vessels, and there was nothing to show who died first, a gift over on the death of the legatee was held not to have taken effect, as the death of the legatee must, according to *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388; 44 L. J. Ch. 56, n., be taken to have meant death in the testator's lifetime. The bequest therefore fell into the residue. After 1925 there will be in such cases a presumption as to survivorship under sect. 184 of the Law of Property Act, 1925. See *post*, p. 400.

Words providing for death of objects, to what period referable.

Whether words providing against the death of devisees or legatees apply to the event occurring in the lifetime of the testator, or at any and what subsequent period, is a question which has been frequently discussed and variously decided. One class of such cases relates to bequests simply to A., and, in case of his death, over; raising the question, therefore, whether these words are to be construed as synonymous with "at or after" the death, which could cut down the interest of the legatee to whose death reference is made to an interest for life; or whether death is to be combined with some other circumstance, in order to satisfy the terms of contingency applied to it, death being in itself a certain and inevitable event. The contingent construction has prevailed, and, in adopting it, the obvious course is to consider the uncertainty contemplated by the testator as referring to the time of death; a point which is easily disposed of when the gift, being simply to take effect in possession at the testator's decease, presents no other period to which the words in question can be referred, *Lowfield* v. *Stoneham*, 2 Stra. 1261; *Hinckley* v. *Simmons*, 4 Ves. 160; *King* v. *Taylor*, 5 Ves. 806; *Cambridge* v. *Rous*, 8 Ves. 12; *Webster* v. *Hale*, 8 Ves. 410; *Ommaney* v. *Bevan*, 18 Ves. 291; *Wright* v. *Stephens*, 4 B. & Al. 574. But this construction seems to be confined to such cases; for it has been held, that where the will supplies a period of distribution subsequent to the death of the testator, the words are referable to that period, *Hervey* v. *M'Laughlin*, 1 Pri. 264; *Whitton* v. *Field*, 9 Be. 368; *Girdlestone* v. *Doe*, 2 Sim. 225; *Re Eve*, 93 L. T. 235; *Re Edwards*, [1906] 1 Ch. 570; 75 L. J. Ch. 321; *Re Fisher*, [1915] 1 Ch. 302. In *Edwards* v. *Edwards*, 15 Be. 357; 21 L. J. Ch. 324, the construction of gifts of this nature was stated to be as follows: (1) a gift to A., and if he shall die, to B.; the contingency has reference to the death of the testator; (2) a gift to A., and if he shall die without children, to B.; the contingency has reference to the death of A.; (3) a gift to Z. for life, with remainder to A., and if he shall die, to B.; or (4) a

Words providing for death of objects;

Edwards v. *Edwards*.

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gift to Z. for life, with remainder to A., and if he shall die without leaving children, to B.; in either case the contingency has reference to the death of Z. the tenant for life. See also *Dean* v. *Handley*, 2 H. & M. 635; *Lewin* v. *Killey*, 13 App. Cas. 783; *Re Mackinlay*, 56 S. J. 142; Hawkins, Constr. Wills, 306 *et seq.* The canons laid down in *Edwards* v. *Edwards* were approved in *Bowers* v. *Bowers*, L. R. 5 Ch. 244; 39 L. J. Ch. 351; *Re Hill's Trusts*, L. R. 12 Eq. 302; 40 L. J. Ch. 594; and *Re Heathcote's Trusts*, L. R. 9 Ch. 45; but the last-mentioned decision was reversed in the House of Lords, and the fourth canon was overruled, *O'Mahoney* v. *Burdett*, 7 H. L. 388; 44 L. J. Ch. 56, n.; *Ingram* v. *Soutter*, 7 H. L. 408; 44 L. J. Ch. 55; *Re Luddy*, 25 Ch. D. 394; 53 L. J. Ch. 21; *Re Schnadhorst*, [1902] 2 Ch. 234; 71 L. J. Ch. 454; *McCormick* v. *Simpson*, [1907] A. C. 494; 77 L. J. P. C. 12. See, however, *Olivant* v. *Wright*, 1 Ch. D. 346; 45 L. J. Ch. 1; *Besant* v. *Cox*, 6 Ch. D. 604, as to what is sufficient context to restrict the contingency to the period of distribution. And see *Re Poultney*, [1912] 2 Ch. 541; 81 L. J. Ch. 748; *Ward* v. *Brown*, [1916] A. C. 121; 85 L. J. P. C. 183; *Re Roberts*, [1916] 2 Ch. 42; 85 L. J. Ch. 713; *Re Brailsford*, [1916] 2 Ch. 536; 85 L. J. Ch. 709. It is well established, that if a testator devises or bequeaths property to A., and in case of his death under the age of twenty-one years to B., the gift to B. will take effect in the event of A. dying under the prescribed age, either in the lifetime of the testator or afterwards, *Willing* v. *Baine*, 3 P. W. 113; *Humberstone* v. *Stanton*, 1 V. & B. 385. And it would not, it seems, be conclusive against this construction, that the gift over purported to dispose of the "share" or "legacy" of the prior devisee or legatee who could not, strictly speaking, be an object of gift until the testator's decease, *Humphreys* v. *Howes*, 1 R. & M. 639; *Walker* v. *Main*, 1 J. & W. 1; *Harris* v. *Davis*, 1 Col. 416. See also *Re Gaitskell's Trust*, L. R. 15 Eq. 386.

—when not referable to death in testator's lifetime.

When there are in a will successive limitations of personal estate in favour of several persons absolutely, the first of those persons who survives the testator takes absolutely although he would have taken nothing if any previous legatee had survived and taken, the effect of the failure of an earlier gift being to accelerate, not to destroy, the later gift, *Re Lowman*, 1895, 2 Ch. 348; 64 L. J. Ch. 567. And as to freeholds, see *Re Dunstan*, [1918] 2 Ch. 304; 87 L. J. Ch. 597.

In some instances, however, words expressly pointing at the death of the legatee have been construed to apply exclusively to such event occurring after the testator's death; the postponement of payment affording a period subsequent to the death of the testator to which they could be referred. Thus, if a testator bequeaths property to A. for life, and after his death to his children, and provides, that, in case of the death of any of the legatees before their legacies become payable, then the legacy of each so dying shall go to his executors or administrators; these words will be construed as embracing the event of any of the children dying in the interval between the testator's death and the death of A., and not as disposing of the legacies failing by lapse, *Corbyn* v. *French*, 4 Ves. 418; *Bone* v. *Cook*, M'Cl. 168; 28 R. R. 697. These cases, however, seem to form a distinct class, and may, it is conceived, be regarded as exceptions to the general rule already stated.

A testator gave his residuary estate to trustees, in trust for his mother for life; after her death, in trust for all the younger children of his two sisters, to be vested interests at twenty-one, with the usual

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provision for the others or other of the said children in case of the death of any under twenty-one; he then made provision for maintenance by directing the trustees to pay the interest of the presumptive share of any child during minority to its mother: it was held that the fund went to the children living at the death of the tenant for life, those dying under twenty-one having defeasible interests, *Berkeley* v. *Swinburne*, 16 Sim. 275; 17 L. J. Ch. 416. See that case explained in *Re Emmet's Estate*, 13 Ch. D. 484; 49 L. J. Ch. 295.

See, as to lapse, *Elliot* v. *Davenport*, 1 P. W. 83, in Tud. L. R. C. P.

Questions as applied to gifts to classes.

Gifts to classes of persons who are not ascertainable until the death of the testator impose the necessity of particular care in preparing clauses which are intended to dispose of the shares of members of the class dying in the testator's lifetime; for, as persons so dying are not objects of the preceding gift, they are not within the clauses in question if construed strictly as substitutional. Thus, where a testator gave the residue of his estate to the children of his brother A. and of his late brother and sister B. and C., who should be living at the death of A. and his wife, in equal proportions; and as to such of them as should be then dead leaving a child or children, such child or children was or were to be or stand in the place of his, her, or their parent or parents; it was held that the bequest was confined to the children of such of the legatees as survived the testator and afterwards died before the time of distribution; and that the children of those who died in the testator's lifetime were not entitled to participate, *Butter* v. *Ommaney*, 4 Rus. 70; 6 L. J. Ch. 54. In *Re Hannam*, [1897] 2 Ch. 39; 66 L. J. Ch. 471, a gift in a will, to take effect after a life estate, to a class ascertainable at the death of the testator, with a substantial gift to the children of deceased members of the class instead of their parents, did not let in the children of parents who died in the testator's lifetime, but who would have been members of the class if they had survived. In several cases, a strong disposition has manifested itself to extend clauses disposing of the "shares" of persons dying before the period of distribution to those who die in the testator's lifetime, though the preceding gift is to a class of objects (as children) not ascertainable until the testator's death, and therefore, it might seem, having no "share" or interest upon which the clause in question can operate, *Willing* v. *Baine*, 3 P. W. 113; *Walker* v. *Main*, 1 J. & W. 1; *Humphreys* v. *Howes*, 1 R. & M. 639; *Smith* v. *Smith*, 8 Sim. 353; 6 L. J. (N.S.) Ch. 175. In another case even the children of a person who had died previously to the making of the will were held to be entitled; there being a substantive original gift to the children of deceased objects concurrently with the living objects, and not a mere clause of substitution, *Tytherleigh* v. *Harbin*, 6 Sim. 329. Indeed, in several subsequent instances, clauses of substitution, though in terms applicable to future events, have been extended to let in the issue of persons who were dead when the will was made, the conclusion from the whole will being that the testator intended to embrace such objects, *Giles* v. *Giles*, 8 Sim. 360; 6 L. J. (N.S.) Ch. 176; *Jarvis* v. *Pond*, 9 Sim. 549; 8 L. J. (N.S.) Ch. 167; *Loring* v. *Thomas*, 1 Dr. & S. 497; 30 L. J. Ch. 789; *Gorringe* v. *Mahlstedt*, [1907] A. C. 225; 76 L. J. Ch. 527. See also *Re Kinnear*, 90 L. T. 537; *Re Lambert*, [1908] 2 Ch. 117; 77 L. J. Ch. 553; *Re Cope*, [1908] 2 Ch. 1; 77 L. J. Ch. 558; *Barraclough* v. *Cooper*, [1908] 2 Ch. 121; *Re Metcalfe*, [1909] 1 Ch. 424; 78 L. J. Ch. 303; *Re Taylor*, 56 S. J. 175.

Clauses of substitution.

Lapse; gifts to classes; substitution.

The point is, whether the gift to the issue is an original gift or a

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substitutional one. See Hawkins, Constr. Wills, ch. 19; *Re Williams*, [1914] 1 Ch. 219; affirmed, [1914] 2 Ch. 61; 82 L. J. Ch. 570, and cases there cited; *Re Clerke*, [1915] 2 Ch. 301; 84 L. J. Ch. 807; *Re Brown*, [1917] 2 Ch. 232; 86 L. J. Ch. 561; *Re Whitehead*, [1920] 1 Ch. 298; 89 L. J. Ch. 155.

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(*h*) A perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation except with the concurrence of the individual interested under that limitation. (Lewis on Perpetuities.)

No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. (Gray on the Rule against Perpetuities, 3rd ed. 174.)

A limitation of estate which postpones the vesting for a life in being (including, by necessary consequence, any number of existing lives), and a further term of twenty-one years, is valid; but any limitation which postpones the vesting for a longer period is invalid as tending to a perpetuity. However, where gestation actually exists, the period of gestation is added to the above limit, *Cadell* v. *Palmer*, 1 C. & F. 372. And a child *en ventre sa mère* is regarded as a life in being, *Re Wilmer's Trusts*, [1903] 2 Ch. 411; 72 L. J. Ch. 670. The rule against perpetuities does not apply to a gift in favour of a charity. See *post*, p. 297.

The death of the testator, and not the date of his will, is to be considered with respect to the question of a devise being too remote, *Vanderplank* v. *King*, 3 Ha. 1; 12 L. J. (N.S.) Ch. 497; *Williams* v. *Teale*, 6 Ha. 239.

Postponement for more than twenty-one years, without a life, void.

It is observable that a testator is not allowed a longer term of years on account of his not availing himself of a life; and, therefore, a gift which postpones the vesting for an absolute period of twenty-one years and one day, without a life, is void, no less than one which suspends the vesting for a life and twenty-one years and a day, *Palmer* v. *Holford*, 4 Rus. 403. In *Lachlan* v. *Reynolds*, 9 Ha. 796, a gift at the end of thirty years was supported on the ground that it was ultimately to vest in persons living at the death of the testator and at the end of the thirty years, and the vesting must therefore take place, if at all, in the life of a person in being at the testator's death.

A gift over if there should be no child or other issue of a tenant for life who should survive the testator and the tenant for life is not void for remoteness, for the word "survive" means that the person to survive shall be living at the time of the event which he is to survive, *Gee* v. *Liddell*, L. R. 2 Eq. 341; 35 L. J. Ch. 640. But as to "survive," see *Re Sing*, [1914] W. N. 90.

Gift cannot be moulded according to the event.

In the application of the rule under consideration, it is an established principle, that a devise or bequest which exceeds the allowed limit cannot be moulded into consistency with the rule of law, because the events have turned out to be such as would have admitted of the gifts being duly restricted; for the construction is to be made according to events which might have happened, and not according to events which have happened, *Pearks* v. *Moseley*, 5 App. Cas. 714; 50 L. J. Ch. 57.

Alternative gifts void in

However, it may, and often does, occur, that a gift over is framed so as to take effect on a double contingency, one branch of which is within

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and the other is beyond the legal limit, which will therefore be good or bad according to the event. Thus, if a testator devises land to the first son of A. who should attain the age of twenty-two years, in fee, and if such son should die under the age of twenty-two years, or if A. should have no son, then to B. in fee; the gift to B. is precisely in this predicament. There are, it will be observed, two distinct devises to him; one to take effect if A. should have a son who should die under twenty-two, which is too remote, and is therefore void, whatever may happen to be the age at which such son dies; the other to arise in the event of A. having no son, which is good, as being necessarily to vest within a life in being, see *Leake* v. *Robinson*, 2 Mer. 363; *Cambridge* v. *Rous*, 8 Ves. 12; *Minter* v. *Wraith*, 13 Sim. 52.

one event and good in another.

These cases depend on the fact that there are really two distinct gifts over depending on two distinct and several events. If one of the events is within the limit, the gift over which depends on that event takes effect, and there can be no reason for holding that gift over invalid merely because in another event which is too remote the gift over which depends on this too remote event is invalid.

But where there is a gift over on one compound event, which includes events too remote and events not too remote, it cannot be split up so as to make it valid in case of the nearer events happening. Thus if there is a gift to A. for life, with a gift over in case he shall have no son who shall attain the age of twenty-five years, it is evident that the event on which the gift over depends might happen either within or beyond the period of the life of A. and twenty-one years after. Thus if A. had no son the event would have happened within the period allowed by the rule against perpetuities. But because the event was expressed as a compound event, it will not be split up, and the fact that the limit might be exceeded will invalidate the gift over, *Proctor* v. *Bishop of Bath and Wells*, 2 H. Bl. 358; *Lord Dungannon* v. *Smith*, 12 Cl. & F. 546; discussed in *Re Fane*, [1913] 1 Ch. 404; 82 L. J. Ch. 225; *Monypenny* v. *Dering*, 2 D. M. & G. 145; 22 L. J. Ch. 313; *Miles* v. *Harford*, 12 Ch. D. 691; *Abbiss* v. *Burney*, 17 Ch. D. 211; 50 L. J. Ch. 348; *Re Harvey*, 39 Ch. D. 289; *Re Bence*, [1891] 3 Ch. 242; 60 L. J. Ch. 636. See the comments on *Watson* v. *Young*, 28 Ch. D. 436; 54 L. J. Ch. 502, by the Court of Appeal in *Re Bence*. If the testator had made the gift to A. for life, and in case he shall have no son who shall attain the age of twenty-five years, or if he shall have no son, then over, this would have been the case of two distinct gifts over depending on two distinct events, one valid, the other invalid; and if the valid event had occurred, the gift over would have been valid within the above first-stated rule as to gifts over. See also *Evers* v. *Challis*, 7 H. L. C. 531; 29 L. J. Q. B. 121; *Hancock* v. *Watson*, [1902] A. C. 14; 71 L. J. Ch. 149; *Re Barker*, 92 L. T. 831.

By sect. 10 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), where an executory limitation was created in an instrument coming into operation after December 31, 1882, in default or failure of the issue of a person to whom an estate is given, it was void if and as soon as there was living any issue who had attained the age of twenty-one years.

This section is replaced by sect. 134 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), which provides:—

Restriction on executory limitations.

Sect. 134.—"(1.) Where there is a person entitled to—

"(a) an equitable interest in land for an estate in fee simple or for any less interest not being an entailed interest, or

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" (b) any interest in other property, not being an entailed interest,

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with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect.

" (2.) This section applies where the executory limitation is contained in an instrument coming into operation after the thirty-first day of December, eighteen hundred and eighty-two, save that, as regards instruments coming into operation before the commencement of this Act, it only applies to limitations of land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life."

Restriction against alienation by married women.

It would seem that on a bequest to persons *in esse* for life, and afterwards to their unborn children, with a general direction that female children should take for their "separate and inalienable use," the restriction against alienation would be too remote and would be void, *Armitage* v. *Coates*, 35 Be. 1; *Re Teague's Settlement*, L. R. 10 Eq. 564; *Re Game*, [1907] 1 Ch. 276; 76 L. J. Ch. 168.

Executory limitation after an estate tail not too remote.

An executory devise, however remote, may be engrafted on an estate tail; for such an estate being an estate of inheritance, and the owner thereof being competent to defeat the executory limitation and to alien the fee simple, the rule against perpetuities has no place, such rule only requiring that the absolute estate or interest in the subject-matter of the limitation be not kept in suspense beyond the allowed period, *Nicolls* v. *Sheffield*, 2 Br. C. 215; *Re Haygarth*, [1912] 1 Ch. 510; 81 L. J. Ch. 255. But the trusts of a term limited previously to an estate tail, for raising portions on the failure of the estate tail, are invalid as trenching on the rule against perpetuities, the term not being defeasible by the tenant in tail, *Case* v. *Drosier*, 5 M. & C. 246; 6 L. J. (N.S.) Ch. 353; *Sykes* v. *Sykes*, L. R. 13 Eq. 56; 41 L. J. Ch. 25.

That a devise in tail after payment of debts is not too remote, see *Rimington* v. *Cannon*, 12 C. B. 18; 21 L. J. C. P. 153. And a rent-charge, vested in an existing person in fee simple, but to begin at an uncertain future period, is not void for remoteness, *Gilbertson* v. *Richards*, 5 H. & N. 453; 29 L. J. Ex. 213; and see Sugd. Pow. 15. But an executory interest to arise on a future event which may not happen within the perpetuity limits is void, though limited to an ascertained person who can release it any time, *London and South Western Railway Co.* v. *Gomm*, 20 Ch. D. 562; 51 L. J. Ch. 530; *Edwards* v. *Edwards*, [1909] A. C. 275; 78 L. J. Ch. 504.

As to gifts to classes which are too remote.

Consistently with the principle which forbids our having recourse to subsequent events in order to determine the validity of a devise, a gift to a class extending to persons beyond the allowed line was void, although the class happened to be entirely composed of individuals competent to have been objects of gift; for, as they claimed in a collective character, the accidental circumstances of their respective situation could not impart validity to their claim. Thus, if a gift is made by a testator dying before 1926 to A. for life, and after his death to the children of A. who shall attain the age of twenty-two years, although all the children of A. who attain twenty-two should happen to have been born in the testator's lifetime (and who might therefore, as being persons *in esse*, have taken interests to vest at any age), yet the gift, not being

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confined to them, but embracing in its scope children born at any time during the life of A., whether in the lifetime or after the death of the testator, is too remote, on account of the postponement of the vesting beyond the age of twenty-one years, *Re Dawson*, 39 Ch. D. 155; 57 L. J. Ch. 1061. And the vice of remoteness affected the class as a whole, if it might affect an unascertained number of its members, *Pearks* v. *Moseley*, 5 App. Cas. 714; 50 L. J. Ch. 57; *Re Mervin*, [1891] 3 Ch. 197; 60 L. J. Ch. 671. See also *Re Bowles*, [1905] 1 Ch. 371; 74 L. J. Ch. 338.

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In the case, however, of gifts by persons dying after 1925 the law is altered by sect. 163 of the Law of Property Act, 1925 (15 Geo. 5, c. 20) which provides:—

Validation of certain gifts void for remoteness.

Sect. 163.—"(1.) Where in a will, settlement or other instrument the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is made to depend on the attainment by the beneficiary or members of the class of an age exceeding twenty-one years, and thereby the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limitation, or trust arising on the total or partial failure of the original gift, is, or but for this section would be, rendered void for remoteness, the will, settlement, or other instrument shall take effect for the purposes of such gift, gift over, remainder, executory limitation, or trust as if the absolute vesting or ascertainment aforesaid had been made to depend on the beneficiary or member of the class attaining the age of twenty-one years, and that age shall be substituted for the age stated in the will, settlement, or other instrument.

"(2.) This section applies to any instrument executed after the commencement of this Act and to any testamentary appointment (whether made in exercise of a general or special power), devise, or bequest contained in the will of a person dying after such commencement, whether the will is made before or after such commencement.

"(3.) This section applies without prejudice to any provision whereby the absolute vesting or ascertainment is also made to depend on the marriage of any person, or any other event which may occur before the age stated in the will, settlement, or other instrument is attained."

The ordinary causes of the excessive remoteness of gifts to children as a class have been, that they either included the issue of unborn persons, or deferred the vesting of the shares of unborn children to an age later than majority. A testator is in less danger of overstepping the legal boundary whilst providing for his own children and grandchildren, than when the objects of his bounty are the children or grandchildren of another; since he has only to avoid protracting the vesting of his grandchildren's shares beyond their ages of twenty-one years. If the vesting of a grandchild's share is postponed until the death of the survivor of its parents, the gift is too remote; since a child of the testator may marry a person born after the testator's death, and that parent may be the survivor, *Hodson* v. *Ball*, 14 Sim. 574; 12 L. J. Ch. 80; *Lett* v. *Randall*, 3 S. & G. 83; 24 L. J. Ch. 708; *Buchanan* v. *Harrison*, 1 J. & H. 662; 31 L. J. Ch. 74. But if the vesting be not postponed beyond majority, the extension of the gift to after-born grandchildren would not invalidate it, because all the children of a testator must be *in esse* at his decease, and their children must be born in *their* lifetime, which brings it within the compass of a life in being at the death of the testator. On the other hand, a gift embracing the whole range of the grandchildren of a living person, other than the testator himself, would be clearly void,

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though the vesting was to take place at majority, or even at the instant of birth, for the grandfather might have children born after testator's decease; and as the gift would extend to the children of such after-born children, it would be too remote.

In *Elliott* v. *Elliott*, 12 Sim. 276, a bequest to the children of A., "as and when they should attain their respective ages of twenty-two years," was held to refer only to the children of A. born during testator's lifetime, and to be valid. This case was followed by Stirling, J., in *Re Coppard's Estate*, 35 Ch. D. 350; 56 L. J. Ch. 606.

A gift to the children of A. and the grandchildren of B. (a living person) is void for remoteness, the whole gift failing by reason of the failure as to part, *Leake* v. *Robinson*, 2 Mer. 363. But after a devise to A. for life, with remainder to the children of A. for their lives, equally, a devise over, of the share of any child dying, to his children, is good as to the children of such children of A. as were living at the testator's death, the gift to every member of the class being single and independent of the gift to every other member, *Cattlin* v. *Brown*, 11 Ha. 372. And if the shares are necessarily ascertained within due limits, it is immaterial that, as to some particular shares, conditions are superadded which may or may not be void for remoteness, *Pearks* v. *Moseley*, 5 App. Cas. 714; 50 L. J. Ch. 57.

Gift to an unborn person taking holy orders.

A gift to an unborn person, to take effect on his performance of an act which cannot be done until the attainment of an age posterior to majority, is clearly bad. Of this nature is a devise or bequest to the first unborn son of A. who shall take holy orders; for, as the canons of the Church of England require deacons to be twenty-three, and priests to be twenty-four, years of age, it follows that if A. should die, leaving a son under two years of age, the vesting would necessarily be deferred beyond a life in being and twenty-one years afterwards, *Proctor* v. *Bishop of Bath and Wells*, 2 H. Bl. 358.

Gift to an unborn person on an event which may or may not happen within due limits.

Where the act, the performance of which is made a condition precedent to the vesting, is of such a nature that it may be performed either before or after the devisee's majority, as entering at a university, taking a commission in the army, or the like, the fate of the gift seems to be more questionable; but, even in this case, it appears by the better opinion to be void, for the doctrine to be gathered from the authorities is, that the gift must necessarily take effect within the period allowed by the rule of law, or fail, *Tollemache* v. *Earl of Coventry*, 2 C. & F. 611. Indeed, even in the case before suggested, of a gift to a person taking orders, there is only a possibility of remoteness, because an unborn son of A. might attain the age of twenty-three or twenty-four, and be ordained in the lifetime of his father, and then the gift would in the event be confined within the compass of a life in being.

Application to powers.

Special power.

Where a power of appointment is created by deed or will in favour of a defined class of objects, the appointment must be made to persons competent to have taken immediately under the instrument creating the power. In exercising a special or particular power the rule against perpetuities must be borne in mind. For the purposes of the rules the limitations created by the exercise of the special power are read as if contained in the instrument creating the power, *Re Thompson*, [1906] 2 Ch. 199; 75 L. J. Ch. 599; *Re Nash*, [1910] 1 Ch. 1; 79 L. J. Ch. 1. The power, however, is not void, because it includes, or may include, objects exceeding the perpetuity limits, *Re de Sommery*, [1912] 2 Ch. 622; 82 L. J. Ch. 17; and if it is exercised in favour of persons within the

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limits, the appointment is a good one, *Slark* v. *Dakyns*, L. R. 10 Ch. 35; 44 L. J. Ch. 205. A general power does not interfere with the freedom of alienation, and has no tendency to a perpetuity; consequently the rule against perpetuities begins to run from the date of the instrument executing the power, Lewis, Perpet. 483; Sugd. Pow. 394—397. And this applies whether the general power is exercisable by deed or will, or by will only, *Rous* v. *Jackson*, 29 Ch. D. 521; 54 L. J. Ch. 732, in which case Chitty, J., declined to follow *Re Powell's Trusts*, 39 L. J. Ch. 188. Limitations depending or expectant upon a prior limitation which is void for remoteness are themselves invalid, but limitations in default of appointment under a power which is void for remoteness are not necessarily invalid unless they are themselves obnoxious to the rule against perpetuities, *Re Abbott*, [1893] 1 Ch. 54; 62 L. J. Ch. 46. See Jarm. Wills, 351.

Powers to appoint to the issue of a marriage are frequently vested by an ante-nuptial settlement in both or one of the marrying parties; which powers must be exercised in favour of issue born in the lifetime of the parents or one of them, which, indeed, the children of the marriage necessarily are, so that an express restriction is never required, unless the power embraces remoter issue, *Robinson* v. *Hardcastle*, 2 T. R. 241; *Bristow* v. *Warde*, 2 Ves. J. 336; *Crompe* v. *Barrow*, 4 Ves. 681. As before observed, even where a power is not in terms duly restricted, yet, if it is exercised in favour of individuals who are within the line, the appointment is valid. In the converse case, *i.e.*, where the power is duly restricted, but the appointment is not, the latter is a mere nullity *quoad* the remote appointees; and therefore, even if it were made to the whole as a class, yet, as the remote appointees are not objects of the power, the extension of the appointment to them would not prevent its taking effect as to the competent objects. If, however, the power is unrestricted, and the appointment is to a class embracing objects who are too remote, it will be void *in toto*, according to the rule applicable to gifts in general, *Routledge* v. *Dorril*, 2 Ves. J. 357.

It is also to be observed, that where an appointment is in the first instance made in favour of certain objects who are within the scope of the power, and there is engrafted on this a clause settling the shares of one or more of the appointees in a manner unauthorised by the power, and void as exceeding the limit of the rule against perpetuities, the effect is not to invalidate the appointment in regard to such share or shares, but solely to detach from it the clause in question, leaving the appointment to take effect as a simple absolute disposition, according to the mode in which it originally stood, *Carver* v. *Bowles*, 2 R. & M. 301; 9 L. J. Ch. 91; *Kampf* v. *Jones*, 2 Ke. 756; 7 L. J. Ch. 63; *Ring* v. *Hardwick*, 2 Be. 352; *Church* v. *Kemble*, 5 Sim. 525; 3 L. J. Ch. 65; *Lassence* v. *Tierney*, 1 Mac. & G. 551; *Cooke* v. *Cooke*, 38 Ch. D. 202. But the clause, in a case where the appointee has executed or assented to the deed of appointment, may be valid as a settlement by the appointee. Sugd. on Powers, 670, § 18; Farwell on Powers, 2nd ed., 473.

In *Re Russell*, [1895] 2 Ch. 698; 64 L. J. Ch. 891, a testator gave his residuary estate in trust, after the death of M. and her husband, for all the daughters of M. who should attain twenty-one or marry under that age, with a proviso that the share of any daughter should be held upon trust for her for life, and after her death upon similar trusts for her children as were thereinbefore declared for the children of M.

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Rule against perpetuities.

M. had one daughter only, the plaintiff, who attained twenty-one, and she was born in the lifetime of the testator. *Held*, that the proviso for re-settlement of the shares must be construed as applicable to each share separately, and that although it would have been void for remoteness in the case of daughters born after the death of the testator, it was valid in the case of the plaintiff, and therefore she was only entitled to a life interest in the fund.

A testatrix, having under her marriage settlement power to appoint a fund in favour of her children, by her will appointed a portion of the fund to her son C. for life, and after his death to such persons as he should by will appoint; the appointment to C.'s appointees was void for remoteness, *Wollaston* v. *King*, L. R. 8 Eq. 165; 38 L. J. Ch. 61, 392; *Morgan* v. *Gronow*, L. R. 16 Eq. 1; 42 L. J. Ch. 410. But such an appointment in favour of a person in being at the date of the instrument creating the power, and his appointees, would be good, *Slark* v. *Dakyns*, L. R. 10 Ch. 35; 44 L. J. Ch. 205.

Life interest may be given to an unborn person.

The rule against perpetuities does not prevent the giving of a life interest to an unborn person; for as persons not *in esse* at the death of the testator may be made devisees of the inheritance of lands or legatees of the absolute interest in personalty, they are of course equally competent to take life or other partial interests. See Jarm. Wills, 348. If, therefore, a testator stops at the creation of such life interests, his disposition is perfectly consistent with the rule of law. But a limitation of land by way of remainder to the children or issue of an unborn person, following a gift for life to such unborn person was, as to such remainder, void, under an instrument coming into operation before 1926, *Monypenny* v. *Dering*, 2 D. M. & G. 145, 170; 22 L. J. Ch. 313; *Whitby* v. *Mitchell*, 44 Ch. D. 85; 59 L. J. Ch. 485; *Re Nash*, [1910] 1 Ch. 1; 79 L. J. Ch. 1; *Re Clarke's Settlement Trust*, [1916] 1 Ch. 467; 85 L. J. Ch. 592. Thus, if a testator gave lands to A. for life, with remainder to his unborn children for life, remainder to the children of such children as tenants in common in fee, the devises to A. and his children took effect, and the inheritance, which the ulterior devise purports to dispose of, descended to the heir-at-law or residuary devisee of the testator. See also *Re Ashforth*, [1905] 1 Ch. 535; 74 L. J. Ch. 361; *Re Park's Settlement*, [1914] 1 Ch. 595; 83 L. J. Ch. 528; *Re Bullock's Will Trusts*, [1915] 1 Ch. 493; 84 L. J. Ch. 463; *Re Garnham*, [1916] 2 Ch. 413; 85 L. J. Ch. 646; and note (*c*) to Prec. 17. This rule is, however, abolished in the case of limitations or trusts of land created by an instrument coming into operation after 1925, by sect. 161 (1) of the Law of Property Act, 1925 (15 Geo. 5, c. 20), which enacts:—

Sect. 161.—"(1.) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities."

This rule did not extend to personalty, and therefore a limitation to the issue of an unborn person is valid provided that the interests vest indefeasibly within twenty-one years from the death of a person in being, *Re Bowles*, [1902] 2 Ch. 650; 71 L. J. Ch. 822, but not necessarily in possession and not necessarily for an absolute interest.

A gift over after a life interest to an unborn person is valid, if such gift over is in favour of a person who is within the perpetuity limit or of a class necessarily ascertained within the limits of the rule, *Stuart* v. *Cockerell*, L. R. 5 Ch. 713; 39 L. J. Ch. 729.

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A devise to a person in being for life, then to the unborn children of such person in being, as tenants for life, and after the death of the longest liver of the tenants for life, upon such trusts as the longest liver should appoint, and in default of appointment to the testator's heir, gives the property after the death of the longest liver of the tenants for life to the testator's heir, the power of appointment being void, as the person to exercise it is not necessarily ascertainable within a life or lives in being and twenty-one years, *Re Hargreaves*, 43 Ch. D. 401; 59 L. J. Ch. 384. A gift to testator's daughters for life, and on her death for such child or children of hers as should live to attain twenty-one years, and also for such child or children of any son of hers who should die under twenty-one, as should live to attain the age of twenty-one years, equally is void; and evidence that the daughter at the testator's death was past the age of child-bearing, which evidence, if admitted, would have made the gift valid, is not admissible, *Re Dawson*, 39 Ch. D. 155; 57 L. J. Ch. 1061; *Ward* v. *Van der Loeff*, [1924] A. C. 653; 93 L. J. Ch. 397.

Cy près doctrine.

In some instances devises of land which extended the limitations to too remote a line of issue were rendered valid by the doctrine of *cy près*, or approximation. According to this doctrine, if a testator devised lands to A. for life, with remainder to the eldest son (unborn) of A. for life, with remainder to the first and other sons of such eldest son successively in tail, the Courts, in order to prevent the testator's intention in favour of the issue of the son of A. from being entirely defeated, accelerated the ultimate limitation by giving the estate tail to the son himself, instead of to his son; thereby reducing the limitations to a devise to A. for life with remainder to his first and other sons in tail. It will be observed, that, under these modified limitations, the intended tenants in tail took by descent (supposing the estate tail to remain unbarred) similar estates to those which it was attempted to vest in them by purchase, *Nicholl* v. *Nicholl*, 2 W. Bl. 1159; *Robinson* v. *Hardcastle*, 2 T. R. 241, 380, 781; see also *Hopkins* v. *Hopkins*, Ca. t. Talb. 44. It is clear that this doctrine did not extend to bequests of personalty, *Routledge* v. *Dorril*, 2 Ves. J. 357, 365; nor to gifts of real estate which would confer on the too remote issue estates in fee simple, *Bristow* v. *Warde*, 2 Ves. J. 336. It did, however, apply where they were made tenants in common in tail, *Pitt* v. *Jackson*, 2 Br. C. 51; *Vanderplank* v. *King*, 3 Ha. 1; 12 L. J. (N.S.) Ch. 497; see also *Williams* v. *Teale*, 6 Ha. 251. The doctrine, however, did not apply where the devise to the issue of the unborn person, instead of running through the whole line of sons, was restricted to the eldest son, as in such case the devolution of the estate under an entail (which would include all the sons) differs so widely from the destination contemplated by the testator, *Monypenny* v. *Dering*, 2 D. M. & G. 145; 22 L. J. Ch. 313. See also *Hampton* v. *Holman*, 5 Ch. D. 183; 46 L. J. Ch. 248; *Re Richardson*, [1904] 1 Ch. 332; 73 L. J. Ch. 153; *Re Mortimer*, [1905] 2 Ch. 502; 74 L. J. Ch. 745. And see now sect. 130 (1) of the Law of Property Act, 1925.

Scheme by which the vesting of shares of unborn children may be postponed beyond majority.

The doctrine of the case of *Cadell* v. *Palmer*, 1 C. & F. 372, does not lead to any alteration in the ordinary form of gifts to unborn children, which are commonly made to confer vested interests at majority; but it affords the means of carrying into effect the designs of some testators, who are anxious to postpone the vesting to a later age. For instance, suppose a testator, distrustful of the prudence which ordinarily belongs

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to the legal age of discretion, is desirous to postpone the vesting of the shares of his grandchildren, born and unborn, until the age of twenty-five; a gift aiming directly and absolutely at this object would be ineffectual, *Leake* v. *Robinson*, 2 Mer. 363; *Bull* v. *Pritchard*, 1 Rus. 213; 16 L. J. (N.S.) Ch. 185; *Re Hume*, [1912] 1 Ch. 693; 81 L. J. Ch. 382; but the gift would be rendered valid by carving out a period composed of existing lives and twenty-one years, and restraining the vesting (as in the text) within the compass of such period. This expedient, while it preserves inviolate the rule of law, exposes the testator's scheme of postponing the vesting of the grandchildren's shares until their ages of twenty-five to very little actual risk of being frustrated, since several lives and twenty-one years are almost certain to outrun one of those lives (for the parent of the objects of the gift would of course be made one of the *cestuis que vie*) and twenty-five years.

As to the validity of indefinite powers of sale.

Indefinite power of sale.

One point of much interest in connection with the doctrine of the rule against perpetuities is as to the validity of indefinite powers of sale, *i.e.* powers which are so framed as not necessarily to be exercisable within the compass of a life in being and twenty-one years afterwards, and which, therefore, might seem to admit of the possibility of the estate being shifted in derogation of the limitations in the will or settlement for an unlimited period. In *Lantsbery* v. *Collier*, 2 K. & J. 709; 25 L. J. Ch. 672, Sir W. Page Wood, V.-C., reviewed the authorities respecting powers of sale not restricted in terms as to time, and declared that the Court looks to the whole intent and purpose of the settlement, and, whether the reversion or remainder in fee simple is limited after estates for life or estates tail, will hold the power to be valid and subsisting until the estates tail (if any) are barred, or the fee simple vested in possession—in either of which events, the purpose of the settlement is at an end, and the power is determined, 2 K. & J. 722; see also *Wolley* v. *Jenkins*, 23 Be. 53; 26 L. J. Ch. 379; on appeal, 5 W. R. 281; *Taite* v. *Swinstead*, 26 Be. 525; *Re Brown's Settlement*, L. R. 10 Eq. 349; 39 L. J. Ch. 845; *Peters* v. *Lewes and East Grinstead Railway Co.*, 18 Ch. D. 429; 50 L. J. Ch. 839; Sugd. Pow. 851; Jarm. Wills, 311; and compare *Re Allott*, [1924] 2 Ch. 498; 94 L. J. Ch. 91. But where in a deed or will there is a limitation of real estate to one for life, and upon the death of the tenant for life upon trust to divide amongst certain persons, with power or authority to the trustees to sell, at such times as they shall think fit, all or any portions of such real estate, such power may be exercised within a reasonable time after the death of the tenant for life, and after the property has become absolutely vested in possession, if on the construction of the particular instrument it appears to be the intention of the settlor or testator that it should be then exercised, *Re Cotton's Trustees and the School Board for London*, 19 Ch. D. 624; 51 L. J. Ch. 514; *Re Lord Sudeley and Baines & Co.*, [1894] 1 Ch. 334; 63 L. J. Ch. 194; *Re Dyson and Fowke*, [1896] 2 Ch. 720; 65 L. J. Ch. 791. As to a *bona fide* exercise of discretion to postpone sale, see *Re Horsnaill*, [1909] 1 Ch. 631; 78 L. J. Ch. 331; *Re Kipping*, [1914] 1 Ch. 62; 83 L. J. Ch. 218; *Re Marshall*, [1914] 1 Ch. 192.

In *Re Daveron*, [1893] 3 Ch. 421; 63 L. J. Ch. 54, where a testator directed certain real estate to be sold on the expiration of a lease which had forty-nine years to run at the date of his death (which power of sale was therefore clearly void), and that the proceeds thereof should be distributed among certain named persons, it was held that the legatees of the proceeds of sale were entitled to the property, inasmuch as they

had the right in equity to elect to take the property as real estate. In such a case, if the property is sold under a decree of the Court, the proceeds of sale, for the purpose of transmission to the representatives of a deceased beneficiary, will be real and not personal estate, *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; 62 L. J. Ch. 649. See *Re Appleby*, [1903] 1 Ch. 565; 72 L. J. Ch. 332. NOTES TO PREC. 18.

In *Re Wood*, [1894] 3 Ch. 381; 63 L. J. Ch. 790, a testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel pits were worked out, and then to sell them and hold the proceeds on trust for certain persons to be then living. *Held*, that both the direction to sell and the trust of the proceeds were void for remoteness. It is to be noted that, in *Re Daveron*, *ubi sup.*, the persons entitled to the proceeds of sale were existing persons, whereas in *Re Wood*, the persons entitled to the proceeds of sale were not ascertainable within the period allowed by the rule against perpetuities.

In *Cole* v. *Sewell*, 4 Dr. & War. 1, affirmed 2 H. L. C. 186, Lord St. Leonards used language which was read as meaning that the rule against perpetuities did not apply if the limitation was by way of remainder. However, in *Re Frost*, 43 Ch. D. 246; 59 L. J. Ch. 118, Kay, J., pointed out that such was not Lord St. Leonards' meaning, and held that the rule against remoteness is applicable to contingent remainders as well as to contingent limitations by way of executory devise. But see Sanger on Wills and Intestacies, 2nd ed., p. 25. Whether the objection of remoteness is applicable to a remainder.

Under sect. 10 (3) of the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), a trust for sale subsisted, and now under sect. 23 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), subsists, in favour of a purchaser until the land has been conveyed to the beneficiaries or under their direction. Trust for sale.

See further, on the subjects of this note, the case of *Cadell* v. *Palmer*, and the notes thereto, in Tud. L. C. R. P.; Jarm. Wills, ch. 10; Sangar on Wills and Intestacies, 2nd ed., ch. ii.

(*i*) See note (*c*) to Prec. 17.

(*k*) See note (*f*) to Prec. 6.

No. XIX.

PREC. 19.

WILL *of a* TRADESMAN *bequeathing his Business to his Widow, and appointing her sole Trade Executrix.—Appointment of Executors, Trustees and Guardians.—Residue to Trustees, to convert and invest; Income to Wife during her Life; subject thereto, Capital to Children equally; the Issue of deceased Children taking their Parent's Share.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT my wife [*name*] sole executrix of this my will as to the property and assets employed in my business hereinafter bequeathed and I APPOINT my said wife and my sons —— and —— general executors and trustees of this my will and I Appointment of trade executrix, executors and trustees and guardians.

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APPOINT my said sons guardians of my infant children jointly with my said wife and with any guardians or guardian appointed by her (*a*).

Bequest of business, goodwill, &c. and household effects to widow.

3. I GIVE and bequeath unto my said wife absolutely the business of a —— now carried on by me at —— and all the goodwill and stock in trade fixtures and effects which at the time of my death shall be employed by me therein and all moneys and debts which shall then belong and be due to me for or on account of the said business subject nevertheless to the payment of all debts and liabilities due or subsisting in respect of the said business at my death.

4. *Bequest to wife of furniture and personal effects as in Prec.* 8, *clause* 3.

Real estate and residue of personal estate to trustees;

—upon trust to sell and invest the proceeds;

—income to wife during her life;

—capital to children equally;

—issue of deceased child taking parent's share.

5. I DEVISE all the real estate and I bequeath all the residue of the personal estate to which at the time of my death I shall be entitled or over which I shall then have any power of testamentary disposition unto my said wife and my said two sons Upon trust that my trustees shall sell convert and get in my said real and residuary personal estate And invest the moneys to arise from the sale conversion and getting in thereof AND permit my said wife to receive the annual income of the said moneys and investments during her life And from and after her death stand possessed of the same trust premises and the income thereof upon trust for my children in equal shares And I declare that if any child of mine shall die in my lifetime and any child or children of such child of mine shall be living at my death the share to which each child of mine so dying would if living at my death have been entitled under the trust aforesaid shall be held in trust for the child or children of such child of mine who shall be living at my death and if more than one in equal shares.

6. *Investment clause.* See note (*b*) to Prec. 4.

7. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTE to Precedent 19.

(*a*) See note (*f*) to Prec. 12.

No. XX.

PREC. 20.

WILL *of a* TRADER; *Direction to Wife to carry on Business.—Trustees empowered to discontinue or carry it on in certain events, with provision for their remuneration while they carry it on.—Option to eldest, and, if he declines, then to the other Sons successively on attaining Twenty-one to take over Business.—Application of profits while Wife or Trustees carry on.—Real and Residue of Personal Estate to trustees to convert and invest.—Income thereof to Wife during widowhood charged with Maintenance of Children.—On her Death or Marriage Capital to Children equally who attain Twenty-one.—If no Children or Issue attain Twenty-one to Testator's Brother.*

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT my wife during her widowhood and also —— of —— and —— of —— to be executors and trustees of this my will. Appointment of executors and trustees.

3. I BEQUEATH £—— to each of the said —— and —— as some recompense for the trouble they may be put to such legacies to be in addition to any moneys they may be entitled to receive under the provisions of my will while they shall carry on my business as hereinafter provided. Legacies to executors.

4. *Immediate legacy to wife as in Prec.* 6, *clause* 3. Immediate legacy to wife.

5. I MAKE the following specific bequests namely to —— &c. See note (*a*) to Prec. 8. Specific legacies.

6. I DEVISE AND BEQUEATH to my trustees hereinbefore named all my real and the residue of my personal estate UPON TRUST that my trustees shall sell and convert into money such part thereof as at my death is not or as shall not under the trusts of my will be employed in my business of —— and invest the proceeds and stand possessed of such investments upon the trusts hereinafter declared concerning the same. Real and residue of personal estate on trust to convert and invest.

7. I DESIRE that my said wife shall carry on my said business during her widowhood until my eldest son —— or if he die or refuse my other sons successively shall attain the age of twenty-one years and for that purpose shall have the use and occupancy of all my real and personal estate which may be employed therein at my death the rents rates and taxes to which any part thereof may be subject being charged to the account of the said business Direction to wife to carry on testator's business.

PREC. 20.

with full power to manage the same at her discretion except as to the amount of capital to be employed therein which I AUTHORISE my trustees to increase out of the said investments or to diminish at their discretion And if my said wife shall refuse to carry on the said business or shall marry or die before any of my sons shall in accordance with the provisions hereinafter contained be able or willing to carry it on I AUTHORISE my trustees other than my said wife to discontinue or to carry on the same at their discretion so long as there shall be a son of mine under age and any moneys coming to their hands on the discontinuance or winding up for any reason and at any time of the said business shall form part of the residue of my personal estate.

Trustees empowered to discontinue or carry on business in certain events.

Remuneration to trustees.

8. I BEQUEATH to each of my trustees hereinbefore named other than my said wife as long as they shall carry on the said business the annual sum of £—— to be retained by them out of the profits of the said business And whichever of my sons shall first after attaining his age of twenty-one years by writing under his hand inform my trustees of his desire to carry on the said business shall be entitled to the goodwill thereof and to the premises capital stock credits and effects employed therein and belonging thereto upon securing by his bond to my trustees payment within [*four*] years from the time of declaring such option or such other period as my trustees may deem expedient of such a sum as shall be the difference between the sum to which such son may then be entitled under my will and the value of such premises and effects exclusive of the goodwill which he is to have without consideration to be ascertained by two valuers to be appointed one by such son and one by my trustees or their umpire and such bond shall form part of the residue of my personal estate.

Option to sons successively to take over business.

Profits of business to fall into residuary personal estate.

9. [I DIRECT that so long as the said business shall be carried on by my said wife or by my trustees the entire profits thereof after the said payments (if any) to my trustees shall have been made thereout shall form part of the residue of my personal estate] (*a*).

Trusts of investments representing real and residuary personal estate;

—income to wife during widowhood;

—on her death or marriage capital to

10. I BEQUEATH to my said wife the income of the said investments so long as she shall continue my widow for her own use and the maintenance of my children And after her death or second marriage I bequeath the said investments to my children in equal shares But if any of them being a son or sons shall die under the age of twenty-one years or being a daughter or daughters shall die under that age without having been married then as to as well the share originally limited under the preceding trusts as the shares eventually limited under this executory trust to any and every child so dying I BEQUEATH the same to the

others or other of my children in equal shares And if there shall not be any child of mine who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married I BEQUEATH the said investments to my brother —— who shall be considered to have a vested interest therein as from my death.

PREC. 20.

children equally; —if no children attain 21 years, to testator's brother.

11. *Investment clause.* See note (*b*) to Prec. 4.

12. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTE to Precedent 20.

(*a*) This clause should only be adopted where the income of the residue of the testator's estate, apart from the business, is amply sufficient to maintain the widow and children. It will generally be found expedient to treat either the whole or a portion of the profits arising from the business as income. In such a case this clause might be worded as follows:—[I direct that so long as the said business shall be carried on by my said wife or by my trustees *three fourths* parts of the net profits shall be treated as income and paid and applied in the same manner as income arising from the investments representing my residuary estate and the remaining *one fourth* part as capital forming an accretion to the *corpus* of my residuary estate] or [I direct that so long as the said business shall be carried on by my said wife or by my trustees the whole of the net profits arising from the business shall be treated as income and paid and applied in the same manner as income arising from the investments representing my residuary estate].

No. XXI.

PREC. 21.

WILL *of a* TRADER *carrying on Business alone and having an Infant Son and Daughters.—Appointment of Executors and Trustees.—Direction to Wife to carry on Business.—Option to Son of being employed in the Business at a Salary on attaining his Majority; and to take over Business on attaining Twenty-five Years. —Son then to pay Sum into Residuary Estate.—Power to Trustees to carry on Business on Death or refusal of Wife.—Application of Profits:* (1) *while Wife carries on* (a) *whole to her till son Twenty-one,* (b) *then between Wife and Son till latter Twenty-five;* (2) *while Trustees carry on* (a) *Remuneration to them,* (b) *Balance while Wife alive as in* (1), *but on Wife's Death* (*α*) *to form part of Residue till Son Twenty-one,* (*β*) *then, till Son Twenty-five, part to fall into Residue and part to Son.—Power to Wife and Trustees to Sell the Business in certain events.—Application of Proceeds of*

PREC. 21.

Sale: part to fall into Residue, part to Son if he attains Twenty-one.—Wife entitled to Business, subject to certain Payments, on Son's refusal of it at Twenty-five. —On Purchase by Wife, Purchase-money to belong partly to Son, partly to Residue.—Residue of Real and Personal Estate on Trust for Sale, Conversion, Payment of Debts, and Investment.—Income to Wife for Life, she maintaining Children.—Then Capital to Children.— Son not to share if he has Business, but otherwise may do so on conditions.

THIS IS THE LAST WILL of me [*testator's name residence and quality*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Appointment of executors and trustees.

2. I APPOINT my wife [*name*] and —— and —— to be executors and trustees of this my will.

Wife to carry on testator's business.

3. I DIRECT that my wife shall carry on the business of a —— now carried on by me until my son —— attains the age of twenty-five years and that for this purpose she shall have the entire use disposal and management of all the stock-in-trade fixtures and effects which at the time of my death shall be employed by me in the said business and of all moneys and debts which shall then belong and be due to me for or on account thereof And I ALSO DIRECT that for the said purpose my said wife shall have the use and occupation of all messuages shops and buildings in which the said business shall at my death be carried on and that the rent if any and the rates and taxes payable in respect thereof shall be charged to the account of the said business.

Option to son of being employed in the business on attaining his majority.

4. I DIRECT that if within one calendar month after my said son attains the age of twenty-one years he shall express in writing to my said wife if she shall be then carrying on the said business or if not then to my other trustees if they shall be carrying on the said business under the powers hereinafter contained and I direct that she or they as the case may be shall give him one calendar month's previous notice in writing of his power so to do a desire to be employed in the said business she or they shall employ him therein in any position she or they may think fit and shall pay him in respect of his services a yearly salary of £—— at the least payable quarterly on the usual quarter days AND I DIRECT that if my said son shall within one calendar month after he attains the age of twenty-five years express in writing to my said wife or to my other said trustees whichever of them shall be then carrying on the said business his wish to take over and carry on the said business he shall

Option to son to take over business on attaining 25 years.

have and be entitled to the same with the goodwill thereof and the stock-in-trade fixtures effects money and debts then employed in or owing in respect thereof and the messuages shops and premises in which the said business shall then be carried on PROVIDED that before taking over the said business he shall give security by bond or otherwise at his own expense to the satisfaction of my trustees for the payment to them at such times and by such instalments as to them shall seem proper of the sum of £—— which sum shall form part of my residuary estate.

On son taking over business to pay sum into residuary estate.

5. In the event of my said wife refusing or ceasing to carry on the said business as aforesaid or in the event of her death before my said son attains the age of twenty-five years I DIRECT my trustees other than my wife to carry on the same (*a*) and for that purpose I give them the same powers and rights as are hereinbefore conferred on my wife for that purpose.

Power to trustees to carry on business on death or refusal of wife.

6. I DECLARE that for so long as the said business shall be carried on by my said wife the annual profits thereof until my said son attains the age of twenty-one years shall belong to her and that thenceforth until my said son attains the age of twenty-five years they shall be divided as follows namely to my said wife [*three-fourth*] parts thereof and to my said son [*one-fourth*] part thereof such [*one-fourth*] part to be in addition to the said salary payable in respect of his services but the receipt of such [*one-fourth*] part shall not constitute him a partner in the said business (*b*).

Application of profits : (1) while wife carries on business, (a) whole to wife till son 21 ; (b) then between wife and son till latter 25 ;

7. I DECLARE that each of the said trustees other than my said wife for so long as he shall act in the carrying on of the said business shall be entitled to retain out of the annual profits for his own use [*one-eighth*] part thereof And the balance of the said profits shall be applied in the manner hereinbefore provided for the application of the profits of the said business for so long as the same is carried on by my said wife But in the event of my said wife dying before my said son attains the age of twenty-one years I DIRECT that the said balance until my said son attains that age shall form part of my residuary estate And that In the event of my said wife dying at any time before my said son attains the age of twenty-five years the said balance accruing in each year after my said wife's death and after my said son attains the age of twenty-one years until he attains the age of twenty-five years shall be divided as follows namely [*three-fourth*] parts thereof shall form part of my residuary estate and [*one-fourth*] part thereof shall belong to my said son such [*one-fourth*] part to be in addition to the salary payable in respect of his services as hereinbefore provided but the receipt

(2) while trustees carry on business, (a) remuneration to trustees ; (b) balance while wife alive, as in (1) ;

—on wife's death, (α) to form part of residue till son 21 ; (β) then till son 25 part to fall into residue, part to son.

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of such [*one-fourth*] part shall not constitute him a partner in the said business.

Power to wife and to trustees to sell the business in certain events.

8. I DECLARE that in the event of my said wife refusing or ceasing to carry on the said business my trustees other than my said wife may if it should seem desirable to them in the interest of my said son and in the event of my said wife dying before my said son attains the age of twenty-five years or of my said son within one calendar month of his attaining that age not expressing in writing any desire to take over and carry on the said business my said wife if she shall then be carrying on the said business and if not then my trustees other than my said wife shall as soon as possible sell the goodwill of the said business and the stock-in-trade fixtures effects messuages shops and premises and shall get in the moneys and debts which may be employed in or owing in respect of the said business at the time of such sale and getting in And I DIRECT that the moneys to arise from such sale and getting in shall as to [*one-half*] thereof form part of my residuary estate and as to the other [*half*] shall belong to my said son if he attains the age of twenty-one years but if he does not attain that age shall also form part of my residuary estate PROVIDED that if my said wife shall be carrying on the said business when my said son attains the age of twenty-five years she shall on my said son not expressing any desire as aforesaid to take over the same be entitled to the said business and the goodwill thereof and the stock-in-trade fixtures effects moneys and debts then employed in or owing in respect thereof and the messuages shops and premises in which the said business shall then be carried on on giving security by bond or otherwise at her own expense to the satisfaction of my trustees other than my said wife for the payment to them at such times and by such instalments as to them shall seem proper of a sum representing the value of the same (with the exception of the goodwill which she shall be entitled to without payment) such value to be ascertained by two competent and independent valuers one appointed by herself and the other by my trustees other than my said wife and the said sum shall be divided as follows namely one [*half*] thereof shall form part of my residuary estate and the other [*half*] shall belong to my said son.

Application of proceeds of sale of business, part to fall into residue, part to son if he attains 21.

Wife entitled to business on conditions on son's refusal to carry on at 25.

On purchase of business by wife, part of purchase-money to belong to son, part to fall into residue.

9. I DEVISE AND BEQUEATH the residue of my real and personal estate to my trustees hereinbefore named on trust that my trustees shall sell and convert the same into money and thereout in the first place pay my debts funeral and testamentary expenses and invest the remainder and pay the income of such investments to my said wife for her life she thereout maintaining educating and bringing up in a manner suitable to their station

Devise and bequests of residue of real and personal estate on trust for sale and conversion to pay debts and invest.

in life my said son until he attains the age of twenty-one years and my daughters until that age or marriage and also maintaining such of my daughters as being of that age shall not be or have been married And on the death of my said wife I BEQUEATH the said investments to such children of mine then living and such issue then living of my children then dead as being males shall either before or after the death of my said wife attain the age of twenty-one years or being females shall either before or after the same period attain that age or be married as tenants in common in a course of distribution according to the stocks and not to the number of individual objects and so that the issue of a deceased child may take as tenants in common by way of substitution the share only which their parent would have taken had such parent lived and attained a vested interest PROVIDED ALWAYS that if my said son shall have taken over the said business on his attaining the age of twenty-five years he shall not be entitled to any share in the said investments but if he shall not have taken over the said business as aforesaid he shall be entitled to share in the said investments only if he shall bring into hotchpot any sum of money he may receive under the provisions hereinbefore contained as representing the [*one-half*] part of the proceeds of the sale and getting in of the said business with the goodwill thereof and the stock-in-trade fixtures effects moneys and debts appertaining thereto or employed in or owing in respect thereof at the time of such sale or getting in or as representing the [*one-half*] of the sum payable after valuation on the said business being carried on by my said wife after my said son attains the age of twenty-five years as aforesaid.

Income to wife for life, she maintaining, &c., children.

On death of wife, capital to children.

No share of residue to son if he has business.

If business wound up son may share on conditions.

10. *Investment clause.* See note (*b*) to Prec. 4.

11. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 21.

(*a*) See note (*a*), Prec. 23.

(*b*) On the question of determining whether a partnership exists or not, the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2, provides, *inter alia*, that the receipt by a person of a share of the profits of a business shall be *prima facie* evidence that he is a partner; but that the receipt of such share, or of a payment contingent on or varying with the profits of a business shall not of itself make him a partner; and in particular, that a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business shall not of itself make the servant or agent a partner in the business or liable as such; also, that a person being a widow or child of a deceased partner and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, shall not by reason only of such receipt be a partner in the business or liable as such.

PREC. 22.

No. XXII.

WILL *of a* TRADER *carrying on business alone, and having two Infant Sons and also Daughters.—Appointment of Trade Executors and Substitution of Others on Death, &c. of those first Appointed.—Sons to become Trade Executors on attaining their Majority.—Appointment of general Executors, Trustees and Guardians.—Bequest of Business to Trade Executors on Trust to carry it on until Sons attain Majority or Die before then, being the Time of Distribution.—Application of Profits of Business by Trade Executors:* (1) *Remuneration for carrying it on;* (2) *Annuity to Wife;* (3) *Investment and Accumulation of Remainder.—Power to resort to Investments of Profits if further Capital required, or in case of Deficiency of Profits in any Year.—If not resorted to, to become Part of Residuary Estate.—Trade Executors to offer Business when Sons attain their Majority* (1) *to Sons jointly;* (2) *to Elder Son;* (3) *to Younger Son;* (4) *in case Offers refused, Business to be Sold and for this purpose Trade Executors may form Limited Liability Company.—Means Provided for Forming and Bringing out a Company.—Immunity of Trade Executors if Company prove abortive.—Moneys arising from Sale of Business to form part of Residuary Estate.—Bequest of Furniture, &c., to Wife absolutely.—Devise and Bequest of Real and Residue of Personal Estate to Trustees on Trust to Sell and Convert, and to pay Debts, &c., and Legacies, and to Invest Remainder to form an Aggregate Fund.—Annuity out of Fund to Wife for life, Balance for Children and Issue of Testator living at time of Distribution, and, if none, to Legatees named who take Vested Interests at Testator's Death.*

THIS IS THE LAST WILL of me [*testator's name residence and quality.*]

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Appointment of trade executors; sons to become such on attaining their majority.

2. I APPOINT the following persons hereinafter called my trade executors namely A. B. of &c. and C. D. of &c. and my two sons —— and —— as and when each shall attain the age of twenty-one years to be executors of this my will so far as regards the machinery plant fixtures implements utensils stock-in-trade effects goodwill book and other debts money and leasehold property which at my death shall be employed in or connected with

the trade or business of —— now carried on by me at —— under the style of —— AND on the death or refusal to act or to continue to act or on the incapacity to act from any cause of either the said A. B. or C. D. I APPOINT successively —— of &c. —— of &c. —— of &c. a trade executor in the place of the trade executor so dying or refusing or becoming incapable to act (*a*) And I FURTHER DECLARE that in case any person hereinbefore appointed or nominated as a trade executor shall become bankrupt at any time after the date of this my will he shall at once become incapable to act as one of my trade executors AND I APPOINT —— and —— to be general executors and trustees of this my will and to be guardians of my infant children.

Substitution of trade executors on death, &c.

Appointment of general executors, trustees and guardians.

3. I BEQUEATH all the said machinery plant fixtures implements utensils stock-in-trade effects goodwill book and other debts money and leasehold premises to my trade executors UPON TRUST to carry on my said business until both of my sons attain the age of twenty-one years or the survivor of them attains that age or dies under that age and from and after the determination of that period (the time of which determination is hereinafter referred to as the time of distribution) for such further period as may by them be found necessary to effect the sale transfer or winding up of the said business as hereinafter provided And I DIRECT that my trade executors shall apply the profits of the said business until sale transfer or winding up as follows First in the payment to each of themselves while acting as my trade executors of the annual sum of £—— Secondly until the time of distribution in the payment to my wife of the annual sum of £—— she suitably maintaining educating and bringing up my sons during infancy and my daughters until the time of distribution or marriage before that time Thirdly the surplus profits of each year until the time of distribution shall be invested (*b*) and the income of such investment and of any invested income shall be invested in like manner But I declare that if my trade executors shall at any time before the time of distribution require more capital for the said business than that which shall at my death be employed therein or the profits of any year shall be insufficient to make the payments to my trade executors and to my wife hereinbefore directed my trade executors may resort to the said investments of profits and income for such additional capital or to supply the deficiency as they may think fit and if in any year the profits shall prove insufficient to make the aforesaid payments and there shall not be in the hands of my trade executors any such investments as aforesaid they may apply any surplus profits

Bequest of testator's business to trade executors, on trust to carry it on until sons attain majority or die before then.

Application of profits of business by trade executors: (1) Remuneration for carrying it on; (2) annuity to wife; (3) investment and accumulation of remainder.

Power to resort to investments of profits if trade executors require further capital, or in case of deficiency of profits in any year.

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in any subsequent year down to the time of distribution to make up the deficiency of any previous year.

Investments of profits not otherwise applied to be paid to trustees and become part of testator's residuary estate.

4. I DIRECT that subject to the said annual payment to my trade executors until the sale transfer or winding up of the said business the whole of the profits accruing after the time of distribution and any moneys arising in any way from my said business and herein not otherwise disposed of shall be paid to my trustees as part of the capital of my residuary personal estate.

Trade executors to offer business when sons attain their majority; (1) to sons jointly; (2) to elder son; (3) to younger son: (4) in case offers refused, business to be sold, and for this purpose trade executors may form limited liability company.

5. I DIRECT that within one calendar month after the time of distribution my said business including the machinery plant fixtures implements utensils stock-in-trade effects goodwill book and other debts money and the leasehold premises employed in or connected therewith shall be offered at the value set upon the same in the stock book of the said business at the last stock-taking if such stock-taking shall have taken place within twelve calendar months before the time of distribution but if not then at a value to be determined by a competent and impartial valuer appointed by my trader executors to my sons jointly in the first place but in case they shall not within one calendar month after the offer signify their desire to purchase jointly then the same shall within seven days after the expiration of such month be offered in the second place to my elder son and in case he shall not within one calendar month after the offer to him signify his desire to purchase then the same shall within seven days after such last month be offered in the third place to my younger son and in case he shall not within one calendar month after the offer to him signify his desire to purchase then my trade executors shall as soon as possible after the time of distribution adopt such steps as they may think fit for disposing of the said business as a going concern either by private sale or to a company or by the formation of a company with liability limited by shares to take over the said business and they may in their discretion accept payment of the purchase-money in instalments extending over not more than five years and in the case of a sale to a company either in cash or fully paid shares or partly in one way and partly in the other.

Provision of means for forming and bringing out company to purchase business.

6. I DECLARE that should my trade executors resolve to form a company with limited liability as aforesaid they may apply any sum which they may consider necessary not exceeding £—— to form and bring out the said company such sum to be made up out of the said investments of surplus annual profits and income in their hands but should there not be any or not sufficient of such investments in their hands to make up the required sum they shall be entitled to receive from my trustees out of the

aggregate fund hereinafter provided for and the accumulations thereof such sum as together with the said investments will make up the required sum.

Immunity of trade executors if company prove abortive.

7. If the said company after it has been formed and brought out be unable and fail to carry out any contract or modified contract entered into for the sale to it of my said business my trade executors shall not be accountable for any loss to my estate occasioned by reason of such failure or of the said company proving abortive and thereafter they shall still have full power to sell the said business and goodwill privately as hereinbefore provided or to wind up the same as they shall deem advisable.

Money arising from sale of business to form part of testator's residuary estate.

8. I DIRECT that the moneys or shares to arise from the sale transfer or winding up of my said business shall be paid or transferred by my trade executors to my trustees as part of the capital of my residuary personal estate and that my trustees may retain any shares so transferred to them and need not sell and convert the same.

Personal effects to wife.

9. *Bequest to wife of furniture and personal effects as in Prec.* 8, *clause* 3.

Immediate legacy to wife.

10. *Immediate legacy to wife as in Prec.* 6, *clause* 3.

Devise and bequest of real and residue of personal estate to trustees, on trust to sell and convert and to pay debts, &c., and legacies, and to invest remainder to form aggregate fund.

11. I DEVISE AND BEQUEATH all my real estate and the residue of my personal estate UNTO my trustees hereinbefore named UPON TRUST that my trustees shall sell call in and convert into money such parts thereof as shall not consist of money And out of the net moneys produced by such sale calling in and conversion and all other moneys arising from or forming part of my residuary estate pay my funeral and testamentary expenses and debts and the pecuniary legacies bequeathed by this my will or any codicil hereto and the legacy duty on any legacies bequeathed free of duty and invest the residue of the same moneys and I DECLARE that all such investments shall form an aggregate fund which shall be retained by my trustees until the time of distribution and that they shall in the meanwhile invest the income of such investments and of the invested income of such investments so as to accumulate at compound interest until the time of distribution and thenceforth shall hold the said aggregate fund and the accumulations thereof UPON TRUST after paying all expenses incident to the trusts hereby created to pay to my said wife during her life the yearly sum of £—— and to pay to my trade executors such sum as the latter may under the provisions hereinbefore contained be entitled to require from my trustees in order to make up the said sum of £—— for the purposes of forming and bringing out a company to take over my said business and subject to such payments UPON TRUST for my children living at the time of distribution and the issue

Annuity out of aggregate fund to wife for life, balance for children and issue of testator living at time of distribution, and if none to legatees named, who

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take vested interests at testator's death.

then living of my children dying before that time such objects to take as tenants in common according to the stocks and not to the number of individuals composing the class the shares of my sons to be payable immediately and of other issue being males at the age of twenty-one years and of my daughters and of other issue being females at that age or marriage and if there shall not be any object of the same trust or not any such object who shall become entitled to an absolutely vested interest therein then as to my trust fund UPON TRUST for —— if he shall be living at the failure of the preceding trusts in favour of my children and their issue for his absolute use But if he shall not be then living UPON TRUST in equal shares for —— and —— who shall be deemed to have vested interests in their respective shares on my death.

12. *Investment clause.* See note (*b*) to Prec. 4.

13. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 22.

Substitution on death of executor.

(*a*) That a testator may nominate a person to be an executor of his will in case of the death of one of the persons previously appointed to that office, and that such substituted executor will be entitled to probate, whether the death of the executor for whom he is substituted take place before or after the death of the testator, see *In b. Johnson*, 1 Sw. & Tr. 17; 27 L. J. P. 9; *In b. Foster*, L. R. 2 P. & D. 304; 41 L. J. P. 18; and see *In b. Day*, 14 Jur. 490, for a conditional appointment of executor; *In b. Lane*, 4 N. R. 253; 33 L. J. Ch. P. 185, for an alternative appointment; and *In b. Langford*, L. R. 1 P. & D. 458; 37 L. J. P. 20, for a substituted appointment in case of absence. See Wms. Exors. 171.

Power of appointing new executors.

Executors may, under a power contained in the will, keep up the number of executors by fresh appointments from time to time; and executors so appointed will be entitled to probate, *In b. Deichman*, 3 Cur. 123, but not more than four persons may be executors in respect of the same property. Supreme Court of Judicature (Consolidation) Act, 1925, s. 160.

(*b*) See *ante*, note (*b*) to Prec. 4.

PREC. 23.

No. XXIII.

WILL *of a* TRADER *disposing of Real and Personal Estate in favour of his Wife and Children.—Appointment of Executors, Trustees and Guardians.—Property vested in Trustees, with directions to sell the Real Estate, and to carry on Trade.—Wife, during Widowhood, to have the Use and Occupation of Testator's House and Furniture, and to receive the Income of the Trust Estate, maintaining and bringing up the Children.—Portions*

to be raised for Children requiring Advancement during her Widowhood.—On her Death or Marriage, the Capital to be distributed among the Children.—Powers to employ Accountants, &c. PREC. 23.

THIS IS THE LAST WILL of me [*testator's name residence and quality.*]

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT [*names &c.*] to be executors and trustees of this my will and to be guardians of my infant children.

3. I DEVISE AND BEQUEATH all the real and personal estate which shall belong to me at my death unto my trustees hereinbefore named UPON TRUST that my trustees shall dispose thereof according to the directions hereinafter contained (that is to say) I DIRECT that my trustees shall at such time or times after my wife [*name*] shall die or marry again as having regard to the destination of my trust property under this my will they shall judge expedient or during her widowhood with her written consent sell my real property and invest the produce thereof and I DIRECT that my debts and funeral and testamentary expenses shall be paid as soon as may be out of such parts of my personal estate as shall not be required to answer the direction next hereinafter contained.

Devise of real and personal estate to trustees;

—to sell real estate after wife's death or marriage, or sooner with her consent;

—to pay debts, &c., out of personalty not employed in trade;

4. I DIRECT that my trustees shall permit my wife she continuing my widow to carry on the trade or business (*a*) in which I shall be engaged at my death and to use and employ for that purpose such part of my real and personal estate as shall be then used or employed therein with power for my trustees to increase or diminish at their discretion the real and personal estate so used or employed and in the event of her dying marrying or declining to carry on such trade or business then my trustees if they shall think fit may in like manner carry on the same for such period as having regard to the directions hereinafter contained concerning my trust property they shall judge expedient.

—to permit wife to carry on trade and employ real and personal estate: if she die, marry, or decline, trustees may carry it on.

5. I DIRECT that my trustees shall permit my said wife she continuing my widow personally to occupy as her residence the messuage wherein I now reside at —— aforesaid with the appurtenances and to use therein my household furniture and effects plate linen china and consumable stores she keeping the said messuage in repair and paying the expense of insuring the same from loss or damage by fire tempest [or the King's enemies] and also the taxes and other outgoings affecting the same.

Trustees to permit wife to occupy house and use furniture, &c.

6. I DIRECT that subject to the previous dispositions my trustees shall sell and convert my personal property not con-

Trustees to convert personal estate

PREC. 23.

sisting of moneys invested in stocks funds or securities yielding income (other than personal securities) and shall at their discretion either get in the moneys invested as last aforesaid or permit the same to continue so invested and shall invest the produce of the trust property so converted or gotten in.

not invested in stock, &c., and to call in or continue such investments;

7. I DIRECT that my trustees shall permit my said wife she continuing my widow to receive from my death the net annual income actually produced by my trust property howsoever constituted or invested and whether yielding more or less than the ordinary rate of interest including the payments accruing due at my death whether ordinarily apportionable or not and including the profits of my trade or business if carried on pursuant to the direction hereinbefore contained.

—to permit wife during widowhood to receive income of real and personal estate.

Wife to maintain infant sons and unmarried daughters.

8. I DIRECT that my said wife during her widowhood shall out of the income to be received by her pursuant to the last clause maintain educate and bring up my children being sons until the age of twenty-one years and being daughters until that age or marriage (*b*) and shall also maintain such of my daughters as being of that age shall not be or have been married but my trustees shall not be obliged to see this direction fulfilled And that if any of my children being sons shall attain the age of twenty-one years or being daughters shall be married during the widowhood of my wife then it shall be lawful for my trustees but subject to the specific dispositions hereinbefore contained to raise by such means as they shall judge expedient out of my trust property for each such child any sum not exceeding £—— to be applied towards his or her advancement in life in such manner as my trustees shall think most beneficial and to be accounted for by such child on the distribution of my trust property pursuant to the direction hereinafter contained.

Trustees to advance sons coming of age and daughters marrying during wife's widowhood.

Real and personal property (subject to preceding directions) to be in trust for sons attaining twenty-one, and daughters attaining twenty-one or marrying, equally.

9. I DIRECT that subject to the preceding directions my trustees shall hold my trust property for the absolute use of my child if only one or all my children equally if more than one who either before or after my death being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be married (*c*).

Unsold real estate impressed with the quality of personalty.

10. I DIRECT that my real estate shall be considered for the purposes of enjoyment and transmission under the trust declared by the last preceding clause of this my will as converted into personal estate from my death.

Power to employ bailiffs, &c.

11. I DIRECT that my trustees may employ bailiffs collectors clerks accountants and servants in collecting debts and rents (*d*) and otherwise in the administration of my trust property and in making out and keeping the accounts thereof with such salaries and allowances as they shall think reasonable.

12. I DIRECT that my trustee [*name*] whether he shall accept the trusteeship or not shall be the solicitor (*e*) to my trust property and as such notwithstanding his acceptance of the trusteeship be allowed all professional and other charges for his time and trouble which if employed as solicitor to my trustees not being himself a trustee he would be entitled to make (*f*).

One of the trustees, a solicitor, to be allowed to act and charge as such.

13. *Investment clause.* See note (*b*) to Prec. 4.

14. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 23.

As to executor carrying on trade.

(*a*) An executor or administrator is not justified in continuing the testator's or intestate's trade, without an express authority; but an executor is justified in keeping a trading establishment on foot merely for the purpose of completing orders given in the testator's lifetime, or of disposing of the stock and goodwill to advantage, *Garrett* v. *Noble*, 6 Sim. 504; 3 L. J. Ch. 159; *Marshall* v. *Broadhurst*, 1 Cr. & J. 405; 9 L. J. Ex. 105; *Dakin* v. *Cope*, 2 Rus. 170. See Wms. Exors. 1430 *et seq.*

Owing to the personal risks which an executor who carries on his testator's business incurs, it is obviously not to be assumed as a matter of course that every person who might be willing to undertake the ordinary duties of the office would be disposed to subject himself to the risks inseparable from carrying on a trade: and wills, therefore, containing a direction for the carrying on of the testator's trade ought to provide against the event of the executor declining to do so, and should so authorise him, if he should begin the undertaking, to relinquish it at any time; since a person may otherwise be induced to renounce the executorship altogether, as the only means of escaping from the hazards which the testator has annexed to the office.

As to the quantum of capital which may be employed.

Though the entire property of the executor himself is liable to the engagements of the trade, yet that of the testator, it seems, is liable only so far as he has subjected it. If the will authorises the employment of his whole property in the trade, the whole thereby becomes subject to its engagements. But if the testator has limited the capital of the trade to a certain amount, or to property of a particular description, then this appropriated part will be liable in exclusion of the general assets; and if an executor, without any authority from the will of the testator, takes upon himself to trade with the assets, the testator's estate will not be liable, in the event of the executor's bankruptcy, *Cutbush* v. *Cutbush*, 1 Be. 184; 8 L. J. Ch. 175; *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Mad. 138; *Thompson* v. *Andrews*, 1 M. & K. 116; 2 L. J. (N.S.) Ch. 46; *Labouchere* v. *Tupper*, 11 Moo. P. C. 198. And if the executor employs a larger sum than his testator has authorised, the excess, in the event of the executor becoming bankrupt, may be proved as a debt under the bankruptcy, *Ex parte Garland*, 10 Ves. 110; *Re Butterfield*, De G. 319. Where a testator directed generally that his executors should be his successors, for the benefit of his estate, in a business carried on by him in partnership, Sir J. Leach, V.-C., was of opinion that an executrix carrying on the business was not justified in employing more of the assets than the actual capital, *Ex parte Richardson*, 3 Mad. 138. It seems that in general the creditors of the

Executor carrying on trade.

NOTES TO PREC. 23.

trade, who have become such since the death of the testator, as such, have no claim against assets in the hands of legatees, among whom distribution has been made under the direction of the same will which has authorised the trade to be carried on (*ib.*). If any pecuniary remuneration is intended to be made to executors for their trouble in carrying on the trade, the testator should expressly authorise it; since otherwise this, like all the other duties of the office, must be performed gratuitously, *Burden* v. *Burden*, 1 V. & B. 170; though, if an executor employs a third person to conduct the trade, he will be allowed the salary paid to such person. It seems, too, that the Court will, upon a proper application, make a prospective allowance to an executor for any extra trouble of this nature. If a testator appoints trustees to carry on his business and directs that while they are carrying it on each shall receive an annual sum out of the profits thereof, the sums received by the trustees are legacies and liable to legacy duty, *Re Thorley*, [1891] 2 Ch. 613; 60 L. J. Ch. 537. If the testator intends the sum to be a clear yearly sum, he should therefore make proper provision for this in the will.

As to the indemnity which executors who carry on the testator's business under the authority of the will, and with the assent of the creditors, are entitled to, see *Dowse* v. *Gorton*, [1891] A. C. 190; 60 L. J. Ch. 745; *Re Oxley*, [1914] 1 Ch. 604; 83 L. J. Ch. 442.

Maintenance of adults.

(*b*) If the direction to bring up the children is not to be an obligation, it will be necessary to state this expressly. See as to maintenance after infancy, *Re Booth*, [1894] 2 Ch. 282; 63 L J. Ch. 560; *K'Eogh* v. *K'Eogh*, [1911] Ir. R. 396; and see sect. 31 of the Trustee Act, 1925 (15 Geo. 5, c. 19). As to duties in performing the trust, see *Re G.*, [1899] 1 Ch. 719; 68 L. J. Ch. 374.

(*c*) It is always to be remembered that a trust framed in the usual manner in favour of males who attain majority, and females who attain majority or marry, leaves unprovided for the case of a male marrying and dying during minority leaving issue—an event not impossible. Unless the testator deliberately chooses in such a case to subject the issue to the hardship of absolute exclusion, by way of check on the imprudence of early marriages, it would seem proper to make the shares of the entire class (including both male and female objects) vest at twenty-one or marriage.

As to the employment by an executor of a collector of debts.

(*d*) Where the debtors or tenants of a testator are numerous or widely scattered, it is not to be expected that an executor or trustee should personally employ himself in the collection of the debts or rents; and in all cases where, from the circumstances, it is necessary for the executors to employ agents, the executors may do so (see sect. 23 of the Trustee Act, 1925 (15 Geo. 5, c. 19), *ante*, p. 124), and will be allowed the expenses of so doing, but as a general rule they are not allowed to employ an agent to perform those duties, which, by accepting the office of executors, they have taken upon themselves, *Weiss* v. *Dill*, 3 M. & K. 26. As the amount of the allowance made by executors to agents and for which they claim reimbursement out of the estate is sometimes disputed, a clause such as that in the text may be found useful. See *Re Weall*, 42 Ch. D. 674; 58 L. J. Ch. 713.

No allowance to trustee for his trouble.

(*e*) The rule that a trustee, executor, or administrator shall have no allowance for his care and trouble extends to professional services, so that a solicitor can charge his *cestui que trust* only for costs out of pocket, *New* v. *Jones*, 1 M'N. & G. 668, n.; *Moore* v. *Froud*, 3 M. & C. 45; 6 L. J. (N.S.) Ch. 372; *Bainbrigge* v. *Blair*, 8 Be. 588; 14 L. J.

Ch. 405; neither can the partner of a solicitor-trustee charge for his services, *Collins* v. *Carey*, 2 Be. 128; *Christophers* v. *White*, 10 Be. 523. But the costs of a town agent in a cause are allowed, *Burge* v. *Brutton*, 2 Ha. 373; 12 L. J. (N.S.) Ch. 368; and a trustee, though he is a solicitor, may employ another solicitor to transact for him professional business relating to the trust, *Stanes* v. *Parker*, 9 Be. 389. See further as to solicitor-trustees, *Re Corsellis*, 34 Ch. D. 675; 56 L. J. Ch. 294; Wms. Exors. 1497 *et seq.* NOTES TO PREC. 23.

It would seem from the above cases that the case of a solicitor-trustee, acting in litigious business on behalf of himself and his co-trustees, forms an exception to the general rule.

So also, where a solicitor is appointed executor, and he accepts the office, he must perform all the duties thereof without remuneration: even if authorised by the will to charge for "professional services," he cannot charge for the performance of those services which ought to be rendered by an executor in a lay capacity, but is entitled to remuneration only for such services as are strictly "professional," *Chalinder* v. *Herrington*, [1907] 1 Ch. 58; 76 L. J. Ch. 71. It will be seen, however, that the form in the text provides that proper remuneration shall be made for services generally, and not only for such as are strictly professional. See *Re Ames*, 25 Ch. D. 72. Solicitor-executor.

(*f*) The solicitor-trustee must not attest the will, otherwise he will be precluded from charging profit costs, *Re Pooley*, 40 Ch. D. 1; 58 L. J. Ch. 1; approving *Re Barber*, 31 Ch. D. 665, see Wills Act, s. 15 and notes, *ante*, p. 33. It seems that as the effect of this clause is to give the solicitor a bounty under the will, if the estate prove insolvent the clause cannot take effect as against creditors, *Re White*, [1898] 2 Ch. 217; 67 L. J. Ch. 502; *Re Brown*, [1918] W. N. 118; *O'Higgins* v. *Walsh*, [1918] 1 I. R. 126.

No. XXIV.

PREC. 24.

WILL *of a* TRADER *disposing of Real and Personal Estate in favour of his Wife and Children.—Appointment of Executors, Trustees and Guardians.—Specific Bequest to Wife of Wearing Apparel, Wines, &c.—Bequest of Railway Shares.—Pecuniary Legacies to Trustees to invest and pay Income to Wife for Life, Capital for Children as she shall by Will appoint; in Default of Appointment, to fall into Residue.—Real Estate and Residuary Personal Estate to Trustees; to permit Wife to carry on Trade, and to occupy and use the Testator's Dwelling-house, Furniture, &c., while any Son shall be under Age, or Daughter under Age and unmarried, with discretionary Power for the Trustees after her Death or Marriage to carry on, or permit her to carry on, the Trade; eventually to sell or convert, and to divide the Produce among all the Children.—Real and Personal Estate to be valued.—Powers to maintain the*

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Children after the Death or Marriage of the Wife out of the general Income; to advance Children Part of their Shares of Valuation; to raise Money by Mortgage, &c.—Option to Sons in succession to purchase Real Estates.—Powers to settle Partnership concerns.

THIS IS THE LAST WILL of me [*testator's name residence and quality.*]

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Appointment of executors, trustees and guardians.

2. I APPOINT —— and —— to be executors and trustees of this my will and to be guardians of my infant children.

Bequest of wines, &c., to wife.

3. I BEQUEATH to my wife [*name*] all the wines liquors household stores fuel and other articles of household consumption which shall at my death be in or about the dwelling-house which I then occupy and all my wearing apparel.

Immediate legacy to wife.

4. *Immediate legacy to wife as in Prec.* 6, *clause* 3.

Bequest of railway shares.

5. I BEQUEATH to my said wife twenty shares in the —— Railway Company together with any dividends or apportioned part of dividends thereon that may be due to me at my death subject nevertheless to the payment by her of such sums of money or calls thereon as shall become payable after my death But I declare that any call or calls which may be in arrear and unpaid at my death with all interest thereon shall be paid out of my personal estate and that my wife shall be entitled to the benefit of any call or calls sum or sums of money which I may at my death have paid upon the said shares in advance (*a*).

Pecuniary legacy to a charitable institution.

6. I BEQUEATH to the —— Institution the sum of £—— to be applicable for the general purposes of that Institution And I declare that the receipt of the person who professes to be the treasurer or other proper officer for the time being of that Institution shall be a sufficient discharge therefor (*b*).

Bequest to trustee,

—to invest;

—income to wife for life;

—capital for testator's children as she shall appoint;

—in default, to fall into residue.

Cesser of wife's life interest on alienation.

7. I BEQUEATH to my trustees the sum of £—— to be paid at the end of —— calendar months after my death upon the trusts following (that is to say) UPON TRUST to invest the same And upon further trust to pay the annual produce of the same sum of £—— or the investment thereof to my said wife during her life and after her death then As well as to the capital as to the annual produce thenceforth to become due IN TRUST for all or any one or more of my children for such interest or interests in such shares and in such manner as my said wife by her will or any codicil thereto shall appoint but so that the vesting be not postponed beyond twenty-one years after the death of my wife and in default of appointment upon the trusts hereinafter declared concerning the residue of my personal estate BUT I DECLARE that if during the life of my said wife the said annual

produce or any part thereof shall by any means whatever vest in any person or persons other than my said wife so that my said wife shall be deprived of the personal enjoyment thereof then the trust hereinbefore contained in her favour shall as to the annual produce which shall so vest in or become payable to any other person or persons thenceforth absolutely cease and the same annual produce shall during the remainder of her life be applied in the same manner as the same would be applicable if she were dead without having exercised the power of appointment hereinbefore given to her.

Devise of real and bequest of residue of personal estate to trustees,

8. I DEVISE all the real estate and bequeath the residue of the personal estate of or to which I shall be seised possessed or entitled at my death or over which I shall at that time have any disposing powers (*c*) unto the said [*names of trustees*] UPON TRUST that so long as my said wife shall continue my widow and any son of mine shall be under the age of twenty-one years or any daughter of mine shall be under that age not having been married my trustees shall permit my said wife to carry on my business of —— at —— aforesaid and to employ for that purpose such part of my real and personal estate as shall constitute the capital employed therein at my death with any additional capital which my trustees shall think requisite (*d*) And also permit her during the same period (whether she shall carry on such business or not) to have the occupation use and enjoyment of the leasehold messuage or tenement wherein I now reside at —— aforesaid with the garden and appurtenances and the household furniture implements and utensils plate linen china and glass which shall be in or about the same messuage and premises at my death And I declare that the rent and taxes payable in respect of the said leasehold premises during my said wife's occupation thereof shall be paid out of my estate but she shall bear the expense of repairing the same premises and insuring the same and my effects therein against fire And in case my said wife shall die or marry while any son of mine shall be under the age of twenty-one years or any daughter of mine shall be under that age not having been married then UPON TRUST that my trustees shall in their discretion either discontinue or carry on the said business or cause the same to be carried on under their inspection and control so long as any son of mine shall be under the age of twenty-one years or any daughter of mine shall be under that age not having been married and for that purpose employ as capital any part of my real or personal estate with liberty if my trustees shall think fit to permit my said wife notwithstanding her marriage to continue to enjoy the benefit of the trust hereinbefore contained in

—to permit wife, during widowhood, &c., to carry on trade,

—and to occupy testator's dwelling-house, &c.;

—trustees to pay rent and taxes during wife's occupation;

—in the event of wife's death or marriage, trustees may carry on trade.

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her favour during widowhood subject to any restrictions or modifications which my trustees shall deem advisable And subject to the trusts aforesaid As to my said real and residuary personal estate UPON TRUST that with the consent in writing of my said wife while she shall continue my widow and any son of mine shall be under the age of twenty-one years or any daughter of mine shall be under that age not having been married and afterwards in their discretion my trustees shall sell convert and get in such real and residuary personal estate AND with such consent or in such discretion as aforesaid invest the moneys to arise therefrom AND pay the yearly produce of the trust fund constituted of such moneys or of the stocks funds or securities whereon the same shall be invested to my said wife so long as she shall continue my widow she thereout maintaining clothing educating and bringing up my sons for the time being under the age of twenty-one years and my daughters for the time being under that age not having been married And after the determination of the trust lastly hereinbefore contained then upon trust that my trustees shall hold the same trust fund and the yearly produce thenceforth to accrue due for the same IN TRUST for my children in equal shares and if any of them being a son or sons shall die under the age of twenty-one years (*e*) or being a daughter or daughters shall die under that age without having been married then as to the share or shares original and accruing of the child or children so dying In trust for the others or other of my children and if more than one in equal shares And if no child of mine being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married THEN UPON TRUST to permit my said wife to receive the yearly produce of the said trust fund during her life and after her death as to the same trust fund and the yearly produce thereof IN TRUST for such person or persons as at the time of her death would be entitled to my personal estate under the Administration of Estates Act 1925 if I were to die possessed thereof immediately after her death and intestate (*f*) such persons if more than one to take the shares which they would have taken under the same statute.

Subject to previous trusts, to sell and convert residuary real and personal estate, and invest proceeds;

—to permit wife, during widowhood, to receive the income, bringing up children;

—capital for children equally, with benefit of accruer.

Provision for case of child of testator predeceasing him.

9. I DECLARE that if any of my children shall have died in my lifetime and any issue of such child or children respectively so dying shall be living at my death then the share or shares original and accruing to which such child or children so dying would if living at my death have been entitled under the trusts aforesaid shall be held by my trustees UPON TRUST for such persons and in such manner as the same would have been held

if such child or children respectively had died immediately after my death (*g*).

Valuation to be made of residuary estate.

10. I DIRECT my trustees within —— calendar months after my death to cause my real and personal estate to be valued by two competent valuers or if they shall disagree by a third valuer to be named by them before entering upon the valuation as their umpire.

Power to advance children, notwithstanding the prior trusts.

11. I DECLARE that it shall be lawful for my trustees in their discretion either during the continuance or after the determination of the trusts hereinbefore contained antecedent to the trust in favour of my children to raise and apply in or towards the advancement in life of each or any child of mine by apprenticing such child to any trade or business or otherwise any part or parts of his or her expectant presumptive or vested share of my estate not exceeding in the whole £——.

Sons at twenty-one and daughters at twenty-one or marriage, to receive part of their shares;

12. I DIRECT that notwithstanding the trusts hereinbefore contained antecedent to the trust in favour of my children my trustees shall as and when during the subsistence of all or any of such antecedent trusts any child of mine being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married raise and pay to such child in part satisfaction of his or her share of my estate such sum as shall amount or as the case may be shall together with the money if any previously advanced for the benefit of such child under the provision for advancement hereinbefore contained be equal to two-third parts in value of the original share of such child in my estate estimated at the surplus of the valuation hereinbefore directed to be made after deducting the amount of my debts funeral and testamentary expenses and the pecuniary legacies hereinbefore bequeathed But my trustees shall be at liberty with the consent of the child for whom such sum shall be raiseable to retain the same or any part thereof to be employed as capital in carrying on my said business and allow interest thereon at the rate of —— per cent. per annum by half-yearly payments.

—with power to trustees to retain the same as capital for carrying on the business.

Provision for maintenance of children during minority.

13. I DECLARE that it shall be lawful for my trustees after the trust hereinbefore contained for payment to my said wife of the yearly produce of my said trust fund shall determine by her death or marriage and thenceforth so long as any child of mine being a son shall be under the age of twenty-one years or being a daughter shall be under that age not having been married to apply the whole or any part of the yearly produce of the same trust fund for the common maintenance education and bringing up of my son or sons for the time being under that age not having been advanced in life as aforesaid and my daughter or

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daughters for the time being under that age not having been married or advanced as aforesaid and for that purpose in the discretion of my trustees to suspend the payment of any sum or sums of money which any child or children shall under the provision lastly hereinbefore contained have become entitled to receive and the payment of interest thereon.

Power to trustees to raise money by sale or mortgage.

14. I DECLARE that it shall be lawful for my trustees notwithstanding any of the trusts hereinbefore contained to raise any money which shall in their opinion be requisite to answer the deficiency if any of my personal estate not hereinbefore specifically bequeathed to satisfy my debts and funeral and testamentary expenses and the pecuniary legacies hereinbefore bequeathed or to answer the aforesaid provision for the advancement of my children or the aforesaid provision for part payment of their respective shares by selling mortgaging or charging my real and personal estate or any part or parts thereof or by all or any of those means in such manner as my trustees shall think expedient And that the costs of and incident to the said sales and mortgages and of and to any transfers not only of the same mortgages but of any other mortgages upon my estate which in the opinion of my trustees may from time to time be necessary shall be charged upon or paid out of the corpus of my estates

Testator's sons to have liberty of pre-emption at a valuation.

I DECLARE that my trustees shall not in the lifetime of any son or sons of mine who shall have attained the age of twenty-one years sell my real estate or any part thereof until the same shall have been offered by my trustees in writing under their hands to such son if only one or to such sons if more than one successively according to the priority of their birth at a valuation to be made by two valuers named by my trustees or if such valuers shall disagree then to be made by a third valuer to be named by the other two before they shall enter upon the valuation as their umpire nor until such son or each and every of such sons shall have refused or omitted to notify in writing under his hand to my trustees his acceptance of the offer within ten days after the making thereof but no purchaser under my will shall be concerned to take notice of this direction.

Purchasers and mortgagees not required to ascertain the propriety of sale or mortgage.

15. I DECLARE that no purchaser or mortgagee shall be obliged to ascertain the occurrence or existence of any event or purpose in or for which a sale mortgage or charge is hereinbefore authorised to be made or to inquire into or take notice of any matter connected with the propriety or regularity of any sale mortgage or charge.

Power to trustees to settle partnership concerns.

16. I EMPOWER my trustees to adjust and settle my partnership accounts and concerns with my partner [*name*] which it is my wish should be settled in the most liberal manner.

17. *Investment clause.* See note (*b*) to Prec. 4. PREC. 24.

18. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 24.

Calls on shares.

(*a*) In a gift of railway shares upon which calls have been paid in advance, or are still to be paid, it is advisable to express whether or not the legatee is to take the shares as paid up in advance; and on the other hand, upon whom the burthen of the calls due, but unpaid, and of any future calls, is to be imposed.

Payments requisite to make testator's interest complete.

Where a testator specifically bequeaths shares, but further payments are required to make perfect the interest which the testator professes specifically to bequeath, the general personal estate is applicable for that purpose. But where the interest of the testator in the subject-matter which he professes to bequeath is complete, or where it is so treated by him and by all persons unconnected with it, the future calls fall on the legatee, and not on the general personal estate, *Armstrong* v. *Burnet*, 20 Be. 424; 24 L. J. Ch. 473. Thus, if the call was made before the testator's death, the general personal estate would be at the expense of it, but if the calls were made after the testator's death, they would have to be borne by the specific legatee, *Addams* v. *Ferick*, 26 Be. 384; 28 L. J. Ch. 594. See also *Day* v. *Day*, 1 Dr. & S. 261; 29 L. J. Ch. 466; *Re Box*, 1 H. & M. 552; 33 L. J. Ch. 42. The testator's estate remains liable to the calls so long as the shares remain standing in his name in the company's books. And as to payment of calls out of income or out of capital, see *Bevan* v. *Waterhouse*, 3 Ch. D. 752; 46 L. J. Ch. 331; also Buckley on Companies Acts (9th edition), 584.

A bequest of "shares" will pass capital stock, *Morrice* v. *Aylmer*, L. R. 7 H. L. 717; 45 L. J. Ch. 614; but not debenture stock, *Re Bodman*, [1891] 3 Ch. 135; 61 L. J. Ch. 31, unless the testator only had debenture stock, *Re Weeding*, [1896] 2 Ch. 364; 65 L. J. Ch. 743.

A bequest of "all my debentures" will pass both debentures and debenture stock, *Re Herring*, [1908] 2 Ch. 493; 77 L. J. Ch. 665. See *ante*, p. 50.

As to apportionment, see note (*f*) to Prec. 8. And as to a bonus on shares, see Jarm. Wills, 1223 *et seq.*; and *Re Evans*, [1913] 1 Ch. 23; 82 L. J. Ch. 12; *Re Hatton*, [1917] 1 Ch. 357; 86 L. J. Ch. 375.

As to gifts in favour of charity.

(*b*) By the Mortmain and Charitable Uses Act, 1891, land—which expression includes tenements and hereditaments, corporeal or incorporeal, of any tenure—may now be devised and assured by will to or for the benefit of any charitable use, but such land must, *notwithstanding anything in the will contained to the contrary*, be sold within one year from the death of the testator. This time may be extended by the High Court or the Charity Commissioners. Accordingly, a devise of a reversionary real estate to a charity is now valid, *Re Hume*, [1895] 1 Ch. 422; 64 L. J. Ch. 267. But see *Re Ryland*, [1903] 1 Ch. 467; 72 L. J. Ch. 277. Any personal estate by will directed to be laid out in the purchase of land for the benefit of any charitable uses will be held for the benefit of the charitable uses as though there had been no such direction (sect. 7). However, the Court, and also the Charity Commissioners, are authorised to sanction the retention or acquisition, as the case may be, of any land devised and assured by will for the benefit of any charitable use, or proposed to be purchased out of personal estate by

NOTES TO PREC. 24.

will directed to be laid out, in the purchase of land, if satisfied that such land is required for actual occupation for the purposes of the charity, and not as an investment, and the sanction may from time to time be extended, *Re Sidebottom*, [1901] 2 Ch. 1; 70 L. J. Ch. 448. The Act, however, does not affect Part III. of the Mortmain and Charitable Uses Act, 1888. Part III. of this Act gives power to a testator—whose will must for this purpose be executed not less than twelve months before his death, or be a reproduction in substance of a devise made in a previous will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the testator, and before 1926, had to be enrolled in the books of the Charity Commissioners within six months after the death of the testator—to devise any quantity of land not exceeding twenty acres for any one public park, and not exceeding two acres for any one public museum, and not exceeding one acre for any one school-house for an elementary school. The provision as to enrolment is repealed, after 1925, by sect. 119 of the Settled Land Act, 1925 (15 Geo. 5, c. 18), and by sect. 29 (4) of that Act registration with the Charity Commissioners is substituted.

Devises of land or bequests of personal estate to be laid out in the purchase of land, to or in trust for any of the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any of the Colleges, or houses of learning within any of those Universities, or to or in trust for any of the Colleges of Eton, Winchester, and Westminster, for the better support and maintenance of the scholars only upon the foundations of those last-mentioned Colleges, or to or in trust for the warden, council, and scholars of Keble College, are, by sect. 7, preserved from the operation of the Mortmain and Charitable Uses Act, 1888. This Act repealed, among others, the Act 9 Geo. 2, c. 36, usually known as the Statute of Mortmain, which, however, it re-enacted in many provisions. For the powers of Universities and Colleges to deal with land belonging to them, see the Universities and College Estates Act, 1925 (15 Geo. 5, c. 24).

Money secured on land or other personal estate arising from or connected with land is expressly excluded from the definition of the term "land" in the Mortmain and Charitable Uses Acts of 1888 and 1891, and may therefore now be bequeathed to charities without any fear as to the operation of those Acts.

The Act of 1891 only applies to the wills of testators dying after the passing of the Act, *i.e.* August 5, 1891 (sect. 9).

In *Re Bridger*, [1894] 1 Ch. 297; 63 L. J. Ch. 186, a testator, who died after the passing of the Act, by his will made before the Act bequeathed the residue of his estate to trustees in trust to pay the income thereof to his wife for her life, and from and after her decease in trust to pay "such part of my said residuary trust estate which may by law be given for charitable purposes," to the Brompton Hospital, and as to the remainder of the said residuary trust estate upon trust for E. W. absolutely. *Held*, that the Act applied, and that the will did not show any intention on the part of the testator to confine the gift to the hospital to such property only as could by the law, as it stood at the date of the will, be given for charitable purposes, and that the hospital was entitled to all the residue of the testator's estate, realty as well as personalty. See *Re Harris*, [1912] 2 Ch. 241; 81 L. J. Ch. 512. The Acts of 1888 and 1891 do not extend to Scotland or Ireland.

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By the Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), s. 10, assurances of land by will to institutions mentioned in the Act are exempt from Parts I. and II. of the Act of 1888, and from the requirement as to sale within one year from the death of the testator contained in the Act of 1891, and by sect. 46 (2) of the Education Act, 1918 (8 & 9 Geo. 5, c. 39), are now exempt from enrolment.

Technical and Industrial Institutions Act, 1892.

Gifts to certain Government Departments and Local Authorities for the settlement or employment on the land of men who have served in His Majesty's forces are not to be deemed assurances to a charitable use within the meaning of the Mortmain and Charitable Uses Act, 1888, by the Sailors and Soldiers (Gifts for Land Settlement) Act, 1916 (6 & 7 Geo. 5, c. 60).

Gifts for sailors and soldiers on the land.

Gifts for educational purposes are exempt from the restrictions of the Mortmain and Charitable Uses Acts under sect. 117 of the Education Act, 1921 (11 & 12 Geo. 5, c. 51).

Gifts for educational purposes.

The Land Tax Redemption Act of 42 Geo. 3, c. 116, s. 50, enables persons to give money by will or otherwise, to be applied in the redemption of the land tax affecting lands settled to charitable uses. And by sect. 162, land tax redeemed or purchased under the provisions of the same Act may be given by deed, will or otherwise for the augmentation of any living. As to impropriation tithes, see 13 & 14 Vict. c. 94, s. 23.

Land Tax.

Gifts of land by will to the Governors of Queen Anne's Bounty are authorised by statutes 2 & 3 Ann. c. 20 (c. 11 Ruff.), and 43 Geo. 3, c. 107; see also 45 Geo. 3, c. 84; 7 Geo. 4, c. 66; as also gifts for the augmentation, under certain limitations, of church lands, by statute 43 Geo. 3, c. 108 (the devise not to exceed five acres), 51 Geo. 3, c. 115, and subsequent Acts (see also 7 Geo. 4, c. 66). For the encouragement of such persons as shall be disposed to contribute towards the purposes of the *Act to make better provision for the spiritual care of populous parishes* (6 & 7 Vict. c. 37), it is enacted (by sect. 22, explained by 7 & 8 Vict. c. 94, s. 7, and extended by 14 & 15 Vict. c. 97, s. 24, and 19 & 20 Vict. c. 104, s. 4), that any person having in his own right any estate or interest in any land, tithes, tenements or other hereditaments, shall have power by deed enrolled or by will, to give to and vest in the Ecclesiastical Commissioners all or any part of his estate or interest in such lands, &c., for the endowment or augmentation of the income of ministers or perpetual curates, or for providing any church or chapel for the purposes and subject to the provisions of the said Act. Devises of land to the British Museum are authorised by 5 Geo. 4, c. 39; by 22 Vict. c. 27, s. 7, personalty not exceeding £1,000 may be given by will to purchase or maintain recreation grounds; gifts of property real or personal for the benefit of the inhabitants of the parish or any part thereof may be made to a parish council under sect. 8 (1) (h) of the Local Government Act, 1894; and as to the incorporation of trustees of charities, see 35 & 36 Vict. c. 24.

Gifts of land valid: Queen Anne's Bounty, church lands.

Endowment or augmentation of income of clergy.

British Museum.

Recreation grounds.

The law imposes no restriction whatever on gifts of pure personalty, to any legal charitable purpose; and it would be no objection that such purpose is of indefinite duration. Thus, if a testator bequeaths £1,000 Two and Three-quarters per Cent. Consols to the vicar of A. for the time being, upon trust to apply the dividends thereof to the most deserving of his poor parishioners not receiving parochial relief, from year to year for ever, there can be no doubt of the validity of the gift, though created for a purpose capable of enduring, and likely to endure, for ages; and

As to bequests of personalty to charity.

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even in the event of the failure of the particular objects, if the testator has manifested a general charitable design, such design would not be wholly frustrated, but would be executed *cy-près*, notwithstanding the failure of its particular objects. But if the testator has not manifested a general charitable design, but has merely bequeathed a legacy in favour of a particular charitable object which fails in his lifetime, then there is a lapse, and the doctrine of *cy-près* has no place. See *Clark* v. *Taylor*, 1 Drew. 642; *Fisk* v. *Att.-Gen.*, L. R. 4 Eq. 521; *Re Rymer*, [1895] 1 Ch. 19; 64 L. J. Ch. 36; *Re Wilson*, [1913] 1 Ch. 314; 82 L. J. Ch. 161; *Re Wedgwood*, [1914] 2 Ch. 245; 83 L. J. Ch. 731. There can be no application *cy-près* so long as the testator's directions can be carried out, *Re Weir Hospital*, [1910] 2 Ch. 124, 135; 79 L. J. Ch. 723, but if they cannot be, there will be an application *cy-près*, provided, however, that there is a general intention in favour of charity and not otherwise, *Re Packe*, [1918] 1 Ch. 437; 87 L. J. Ch. 300. And see as to the inability of an endowed charity to fail, *Re Faraker*, [1912] 2 Ch. 488; 81 L. J. Ch. 635. Here then we have an instance of a perpetuity, not only tolerated by the law, but the object of its special sanction and encouragement, which, it is clear, would be equally extended to lands conveyed to charitable uses by a deed enrolled. A trust, however, for accumulation in favour of a charity is not allowed to exceed the limits imposed by the Thellusson Act, *Martin* v. *Margham*, 14 Sim. 230; 13 L. J. Ch. 392; and see *post*, p. 309. As to a conditional gift to a charity, see *Re Swain*, [1905] 1 Ch. 669; 74 L. J. Ch. 354.

Accumulations.

What are charities.

A valid gift for charitable purposes must be either (1) for the relief of poverty; (2) for the advancement of education; (3) for the advancement of religion; or (4) for other purposes beneficial to the community, *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. at p. 583. These four classes may embrace all charities, but unfortunately the scope of class (4) is not easy to define. See the cases discussed under this classification in Tyssen's Charitable Bequests (2nd ed. 1921). A gift of a house to a "public library"—such library being an institution supported by private subscriptions (and consequently liable to dissolution), governed by persons chosen from amongst the subscribers, and existing only for the benefit of the subscribers—is not a gift to charity within the meaning of the Act, but is void as tending to a perpetuity, *Carne* v. *Long*, 2 D. F. & J. 75; 29 L. J. Ch. 503. See *Cocks* v. *Manners*, L. R. 12 Eq. 574; 40 L. J. Ch. 640; *Re Delany*, [1902] 2 Ch. 642; 71 L. J. Ch. 811; and *Re Smith*, [1914] 1 Ch. 937; 83 L. J. Ch. 687, as to gifts to voluntary religious institutions; *Re Clark's Trust*, 1 Ch. D. 497; 45 L. J. Ch. 194; *Re White*, [1893] 2 Ch. 41; 62 L. J. Ch. 342, as to a friendly society; *Re Dutton*, 4 Ex. D. 54, as to a building fund in connection with a mechanics' institution. A gift for keeping in repair a tomb not within a church is not a charitable use, but void as tending to a perpetuity, *Rickard* v. *Robson*, 31 Be. 244; 31 L. J. Ch. 897. But where a testator gave a fund to the trustees of charity A., and committed the care of his family vault in H. cemetery to their care and charge, the "same to be kept in good repair, and name legible, and to re-build when it shall require; failing to comply with this request, the money to go to" charity B., it was held by the Court of Appeal that the condition for the repair, &c., was valid, and binding on charity A., and that the gift over, on failure to comply with the condition, to charity B., was good, on the principle of *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; 19 L. J. Ch. 33, that the rule against perpetuities

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has no application to a transfer, in a certain event, of property from one charity to another, *Re Tyler*, [1891] 3 Ch. 252; 60 L. J. Ch. 686. And see *Re Davies*, [1915] 1 Ch. 543. But this principle does not extend to cases where (a) an immediate gift in favour of private individuals is followed by an executory gift over in favour of a charity, nor (b) an immediate gift to a charity is followed by an executory gift over in favour of private individuals, *Re Bowen*, [1893] 2 Ch. 491; 62 L. J. Ch. 681. See *Hoare* v. *Osborne*, L. R. 1 Eq. 585; 35 L. J. Ch. 345, as to a gift to keep in repair a monument *in* a church, being an ornament, not part of the fabric; see *Hunter* v. *Bullock*, L. R. 14 Eq. 45; 41 L. J. Ch. 637; *Dawson* v. *Small*, L. R. 18 Eq. 114; 43 L. J. Ch. 406; *Re Williams*, 5 Ch. D. 735; 47 L. J. Ch. 92; *Re Birkett*, 9 Ch. D. 576; 47 L. J. Ch. 846; *Re Vaughan*, 33 Ch. D. 187; *Re Rogerson*, [1908] 1 Ch. 715; 70 L. J. Ch. 444, as to gifts of the surplus fund after void gifts for keeping tombs in repair; and as to burial grounds and churchyards, see *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381; *Re Manser*, [1905] 1 Ch. 68; 74 L. J. Ch. 95; *Re Douglas*, [1905] 1 Ch. 279; 74 L. J. Ch. 196; Tyssen's Charitable Bequests (2nd ed. 1921), 91 *et seq.* As to "aged persons" as objects of charitable gifts within 43 Eliz. c. 4, see *Re Wall*, 42 Ch. D. 510; 59 L. J. Ch. 172. A gift "to the poor and the service of God" is charitable, *Re Darling*, [1896] 1 Ch. 50; 65 L. J. Ch. 62. A legacy for the maintenance of the horses and dogs of the testator is not a charitable gift, nor void as a perpetuity, but valid though unenforceable, *Re Dean*, 41 Ch. D. 552; 58 L. J. Ch. 693. A gift for the protection and benefit of animals is charitable, *Re Wedgwood*, [1915] 1 Ch. 113; 84 L. J. Ch. 107. The Society for the Total Suppression of Vivisection is a charity within the statutes, *Re Foveaux*, [1895] 2 Ch. 501; 64 L. J. Ch. 856. Friendly Societies may be charities, *Spiller* v. *Maude*, 32 Ch. D. 158, n.; *Pease* v. *Pattinson*, 32 Ch. D. 154; 55 L. J. Ch. 617; *Cunnack* v. *Edwards*, [1896] 2 Ch. 679; 65 L. J. Ch. 801; *Re Buck*, [1896] 2 Ch. 727; 65 L. J. Ch. 881.

It is a question whether a bequest to an unincorporated body which is not a charity, where such bequest is not for the benefit of the members (*Re Clarke*, [1901] 2 Ch. 110; 70 L. J. Ch. 631), can be enforced, inasmuch as there are no beneficiaries, but in *Re Foveaux*, [1895] 2 Ch. 501; 64 L. J. Ch. 856, Chitty, J., expressed the opinion that such a gift would be valid, and it is clear that where a testator directs who shall give a receipt the executor is justified in paying it, *Re Drummond*, [1914] 2 Ch. 90; 83 L. J. Ch. 817. And see *Re Customs and Excise Officers' Mutual Guarantee Fund*, [1917] 2 Ch. 18; 86 L. J. Ch. 457.

A volunteer corps is a charitable object, *Re Lord Stratheden and Campbell*, [1894] 3 Ch. 265; 63 L. J. Ch. 872. See also *Re Donald*, [1909] 2 Ch. 410; 78 L. J. Ch. 761. So is an officers' mess, *Re Good*, [1905] 2 Ch. 60; 74 L. J. Ch. 512. And see *Re Gray*, [1925] 1 Ch. 362. But a gift for the encouragement of mere sport is not charitable, though it may be beneficial to the public. Therefore, a bequest to provide an annual cup for the encouragement of yacht racing is not charitable, *Re Nottage*, [1895] 2 Ch. 649; 64 L. J. Ch. 695. But games as part of a school curriculum may be the object of charity, *Re Mariette*, [1915] 2 Ch. 284; 84 L. J. Ch. 825; and an annual treat for school children, *Re Mellody*, [1918] 1 Ch. 228; 87 L. J. Ch. 185. A bequest for "charitable *or* philanthropic purposes" is not charitable, *Re Macduff*, [1896] 2 Ch. 451; 65 L. J. Ch. 700; compare *Att.-Gen. for New Zealand* v. *Brown*, [1917] A. C. 393; 86 L. J. P. C. 132; nor is one for

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"emigration uses," *Re Sidney*, [1908] 1 Ch. 488; 77 L. J. Ch. 296; nor is one for "patriotic purposes," *Re Tetley*, [1924] A. C. 262; 93 L. J. Ch. 231. But the purposes of an incorporated society for promoting the preservation of lands and buildings of beauty or historic interest "for the benefit of the nation" are charitable, *Re Verrall*, [1916] 1 Ch. 100; 85 L. J. Ch. 115. A bequest to provide funds for the purchase of advowsons to promote the spread of evangelical principles in the Church is not charitable, *Hunter* v. *Att.-Gen.*, [1899] A. C. 309; 68 L. J. Ch. 449. See also *Re Church Patronage Trust*, [1904] 2 Ch. 643; 73 L. J. Ch. 712.

Bequests to Dissenters, Roman Catholics, and Jews.

As to bequests to Protestant Dissenters, see *Att.-Gen.* v. *Cock*, 2 Ves. S. 273; *Shrewsbury* v. *Hornby*, 5 Ha. 406; *Att.-Gen.* v. *Lawes*, 8 Ha. 32; 19 L. J. Ch. 300; to Roman Catholics, *Walsh* v. *Gladstone*, 1 Ph. 290; *Att.-Gen.* v. *Gladstone*, 13 Sim. 7; 11 L. J. Ch. 361; *Re Smith*, [1914] 1 Ch. 937; *Re Greene*, [1914] 1 I. R. 305; *Bourne* v. *Keane* (masses), [1919] A. C. 815, *post*, p. 357, reversing *Re Egan*, [1918] 2 Ch. 350, and overruling on that point *West* v. *Shuttleworth*, 2 My. & K. 684; *Heath* v. *Chapman*, 2 Drew. 417; and *Re Blundell's Trusts*, 30 Be. 360; to Jews, *Straus* v. *Goldsmid*, 8 Sim. 614; *Re Michel's Trust*, 28 Be. 39; 29 L. J. Ch. 547. A gift to an infidel society is not now considered contrary to public policy, *Bowman* v. *Secular Society, Lim.*, [1917] A. C. 406; 86 L. J. Ch 568.

The law regulating charitable gifts certainly exhibits a singular mixtures of opposite principles. Impediments are thrown in the way of devoting land to charitable uses; but, if those impediments are overcome, the land thus appropriated is never suffered to revert to the donor or his representatives on account of the failure of the charitable objects, so long as there is a general intention in favour of charity, or (which is still stranger) even on account of the donor's omission originally to describe the objects with sufficient definitiveness—circumstances which, by the ordinary rule of construction, would have been fatal to the gift. It should be observed, that though a gift to charity will be sustained, notwithstanding a want of specification of objects, yet it must be distinctly shown that charity is the intended destination, see *Re Sutton*, 28 Ch. D. 464; 54 L. J. Ch. 613; and, if this is uncertain, the doctrine in question lends no support to the intended disposition, as in the case of a trust for such charitable or other purposes, *Ellis* v. *Selby*, 1 M. & C. 286; 5 L. J. (N.S.) Ch. 214; or even for such charitable or public purposes as A. shall appoint, *Morice* v. *Bishop of Durham*, 10 Ves. 522; *Vezey* v. *Jamson*, 1 S. & S. 69; *Blair* v. *Duncan*, [1902] A. C. 37; 71 L. J. P. C. 22; in which cases, the testator having evinced an intention to create a trust but without any definite indication of his purpose, the beneficial interest in the property is undisposed of. See also *Williams* v. *Kershaw*, 5 C. & F. 111; 5 L. J. (N.S.) Ch. 84; *Re Jarman's Estate*, 8 Ch. D. 584; 47 L. J. Ch. 675; and *Houston* v. *Burns*, [1918] A. C. 337; 87 L. J. P. C. 99; distinguished in *Re Bennett*, [1920] 1 Ch. 305; 89 L. J. Ch. 269, and followed in *Att.-Gen.* v. *National Provincial Bank*, [1924] A. C. 262; 93 L. J. Ch. 231.

Wide range of objects, no objection to charitable bequest.

It is no objection, however, that the charity embraces an almost indefinite range of objects, of which a striking example is afforded by *Nightingale* v. *Goulbourn*, 2 Ph. 594; 17 L. J. Ch. 296, where a bequest to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain, was held to be valid as to the pure personalty, though void, under the Act of

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9 Geo. 2, with respect to the personal estate savouring of the realty. In *Whicker* v. *Hume*, 7 H. L. C. 124; 28 L. J. Ch. 396, where the bequest was to trustees in their discretion, "for the benefit and advancement and propagation of education and learning in every part of the world as far as circumstances will permit," this was held to be a valid gift to charity. In *Re Best*, [1904] 2 Ch. 354; 73 L. J. Ch. 808, Farwell, J., held that a bequest of residue upon trust for "such charitable and benevolent institutions" as the trustees should in their discretion determine was not void for uncertainty but was a good charitable gift. For the construction of a bequest to a named charitable institution, "or some one or more kindred institutions," see *Re Delmar Charitable Trust*, [1897] 2 Ch. 163; 66 L. J. Ch. 555. A bequest of residue to be used wholly or in part for "the good of religion" is not charitable, *Dunne* v. *Byrne*, [1912] A. C. 407; 81 L. J. P. C. 202.

As to the powers of trustees holding land on charitable trusts, see sect. 29 of the Settled Land Act, 1925 (15 Geo. 5, c. 18).

See generally as to what is "charity," Tyssen's Charitable Bequests, (2nd ed. 1921), 25 *et seq.* And see that work for a discussion on principle of the cases cited in this note.

General testamentary powers.

(*c*) General testamentary powers are well executed by a general testamentary disposition unless a contrary intention appears by the will, but a special power requires reference to the power, or to the property subject to the power, or expression of intention to exercise the power. See Wills Act, s. 27, *ante*, and notes.

Special testamentary powers.

As to formalities of execution, see Wills Act, s. 10, *ante*, and notes.

As to the formalities of execution.

No appointment and no gift in default.

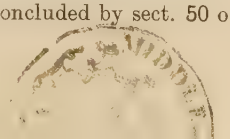
Where there is a power to appoint among certain objects, but no appointment is made, and there is no gift in default of appointment, the Court will sometimes imply a gift to the objects of the power equally, *Brown* v. *Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; *Burrough* v. *Philcox*, 5 M. & C. 73; *Butler* v. *Gray*, L. R. 5 Ch. 26; 39 L. J. Ch. 291; *Wilson* v. *Duguid*, 24 Ch. D. 244; 53 L. J. Ch. 52. See also *Re Eddowes*, 1 Dr. & S. 395; *Goldring* v. *Inwood*, 3 Gif. 139; *Re Hughes*, [1921] 2 Ch. 208; and *Re Combe*, [1925] 1 Ch. 210. As to the period for ascertaining the class, when the objects of the power are a class, see *Re White's Trusts*, Joh. 656. And see Hawkins, Constr. Wills, ch. 6.

(*d*) See note (*a*), Prec. 23.

(*e*) The gift being to the children as a class, those only can participate who survive the testator (see *ante*, sect. 33, p. 69; see also note (*s*), Prec. 11. To provide to some extent for the death of a child in the testator's lifetime leaving issue at his death, a clause of substitution is added, see note (*g*), *infra*.

Gift to next of kin.

(*f*) In framing gifts to persons entitled on intestacy it is of importance to express whether it is to embrace the persons answering the description at the time of the testator's death, or when the gift takes effect in possession. See *Bullock* v. *Downes*, 9 H. L. C. 1; *Mortimore* v. *Mortimore*, 4 App. Cas. 448; 48 L. J. Ch. 470; *Re Wilson*, [1907] 2 Ch. 572; 77 L. J. Ch. 13; *Re Mellish*, [1916] 1 Ch. 562; 85 L. J. Ch. 433. See the cases discussed in *Hutchinson* v. *National Refuges for Homeless and Destitute Children*, [1920] A. C. 794; 89 L. J. Ch. 469. And see for who is entitled under the Administration or Estates Act, 1925 (15 Geo. 5, c. 23), *post*, p. 428. What statutes were known as the "Statutes of Distribution" was decided in *Re Morgan*, [1920] 1 Ch. 196; 89 L. J. Ch. 97; where the Intestates Estates Act, 1890, was held not to be included. The question there decided has now been concluded by sect. 50 of



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the Administration of Estates Act, 1925, which provides for the construction of documents coming into operation before 1926 and after 1925 respectively. Appendix III., *post*, p. 427.

A bequest to the next of kin of a person who is dead at the date of the will must, in ordinary circumstances, receive an interpretation analogous to that adopted in the case of a bequest to the testator's own next of kin, as regards the period of ascertaining who are the persons intended; and if there is nothing in the context to make the words applicable to a class to be ascertained at any other time than that of the testator's death, those who at the testator's death are the next of kin of the deceased person named in the will will be the persons to take, *Philps* v. *Evans*, 4 De G. & Sm. 188; *Wharton* v. *Barker*, 4 K. & J. 483, 502; *Re Rees*, 44 Ch. D. 484; 59 L. J. Ch. 305. And see *Re Soper*, [1912] 2 Ch. 467; 81 L. J. Ch. 826.

Under a bequest after the death of A. to the testator's next of kin according to the statute, A. took a life interest by implication, *Re Springfield*, [1894] 3 Ch. 603; 64 L. J. Ch. 201.

The expression "next of kin" means, in English law, the nearest blood relations in an ascending and descending line, whether of the whole or half blood, and this construction will be placed on that expression in the will of an English testator giving a legacy to the next of kin of a legatee who is a subject of a foreign state, under the law of which relations of the half blood are not deemed next of kin, *Re Fergusson's Will*, [1902] 1 Ch. 483; 71 L. J. Ch. 360.

Substitution of issue for child predeceasing testator.

(*g*) Sect. 33 of the Wills Act does not apply to a gift to a class. This substitutionary clause will make the share of each child dying in the testator's lifetime, and leaving issue surviving the testator, part of the estate of that child and will not substitute the issue for the child. The share will devolve according to the child's will, if any, or if none, will be distributable amongst the child's next of kin according to the statutes, subject, of course, to the child's debts. See notes to sect. 33 of the Wills Act, *ante*. If it is the intention that the share should go to the issue of the child free from his or her debts and dispositions, such issue should be expressly substituted.

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No. XXV.

WILL *of a* TRADER, *engaged in Trade or Partnership as a Builder, &c., providing for a Wife and Children.—Appointment of Executors, Trustees and Guardians.—Real and Personal Estates vested in Trustees for Sale and Conversion, with a Power to raise Money by Mortgage of the Real Estate.—Income to be applied in Payment of an Annuity to Wife during Widowhood, for the support of herself and Children; a reduced Annuity for Wife on Second Marriage; after her Death or Marriage, Annual Allowances for Maintenance of Children; Surplus to accumulate till Youngest Child attains Twenty-one.—Capital and Accumulations to Testator's Children and remoter Issue living at the Determination of the Trust for Accumulation, per*

Stirpes; if none, for Testator's Brothers and Sisters.— Powers to Trustees to advance Testator's Children before the Period of Distribution; to purchase Land, take Building Leases, and let Furnished Lodging-houses; to make Allotments of Real Estate to Objects entitled in Distribution. — Provisions relating to Testator's Trade.—Right of Pre-emption given to Testator's Partner as to Share of Partnership Business; Powers to settle Accounts, sell Stock, &c., lend Money to Testator's Son on Bond.

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THIS IS THE LAST WILL of me [*testator's name residence and quality.*]

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT [*names &c.*] to be executors and trustees of this my will and to be guardians of my infant children (*a*).

Appointment of executors, trustees and guardians.

3. *Bequest to wife of furniture and personal effects as in Prec.* 8, *clause* 3.

Personal effects to wife.

4. I BEQUEATH to my said wife the sum of £—— for housekeeping to be paid by four equal instalments at the end of three six nine and twelve calendar months after my death.

Pecuniary legacy to wife for housekeeping.

5. I DIRECT my executors to provide my wife and my children and the wives of such of my sons as shall be married with such mourning as my executors shall in their discretion think reasonable.

Executors to provide mourning for wife, &c.

6. I DEVISE the freehold and leasehold estates (*b*) to which I shall be entitled at my death unto my trustees hereinbefore named UPON TRUST that my trustees when and as in order to effectuate any of the purposes of my will or with a view to the advantage of my estate or the more convenient division thereof among the persons entitled thereto they shall in their discretion find it necessary or expedient so to do shall sell my said estates or any part thereof or raise money by mortgaging or charging my said estates or any part thereof or by all or any of those means and do and execute all acts and assurances requisite for effecting or facilitating any sale mortgage or charge pursuant to this trust.

Devise of real estates to trustees upon trust to sell or to raise money by mortgage, as the purposes of the will may require.

7. I BEQUEATH the residue of the personal estate and effects (*c*) of every kind to which I shall be entitled at my death unto my trustees hereinbefore named UPON TRUST that my trustees shall sell convert into money get in and receive so much thereof as shall not consist of ready money or of such investments in stocks funds or securities whether authorised investments or not as my trustees shall think it desirable to continue AND I DIRECT my trustees to receive the money to arise from my said residuary

Bequest of residue of personal estate to trustees, upon trust to convert and get in.

PREC. 25.

personal estate and stand possessed thereof together with the stocks funds and securities to be continued as last aforesaid upon the trusts hereinafter declared concerning the same.

Trustees to invest the produce of real and personal estate.

8. As to the moneys to arise from the execution of the trusts hereinbefore contained concerning my real and residuary personal estate and not presently applicable to the purposes of my will I DIRECT my trustees to invest the same and I DECLARE that all the trust moneys stocks funds and securities aforesaid shall form an aggregate fund and be held upon the trusts following namely

Trusts of the aggregate fund arising from the real and personal estate;

UPON TRUST in the first place out of the annual produce thereof to pay an annuity of £—— to my said wife during her life if she shall continue my widow she maintaining educating and bringing up to the satisfaction of my trustees my son or sons for the time being under the age of twenty-one years and my daughter or daughters for the time being under that age not having been married And if she shall fail so to do I authorise my trustees in their discretion to retain and appropriate for that purpose so much of the said annuity as they shall think expedient and to pay the residue to my said wife for her own support and maintenance And if my said wife shall marry again then

—to pay annuity to wife during widowhood, she maintaining, &c., the children;

UPON TRUST to pay to her an annuity of £—— only during the remainder of her life without power of anticipation (*d*) AND after the death or marriage of my widow to raise and apply in or towards the maintenance education and bringing up each son of mine who shall be under the age of twenty-one years and each daughter of mine who shall be under that age not having been married the yearly sum of £—— till the age of —— years the yearly sum of £—— from the age of —— to —— years and thenceforth the yearly sum of £—— in such manner as my trustees shall in their discretion think fit

—if she neglects, trustees may apply part of the annuity for that purpose;

AND I DIRECT the said annuity of £—— to be paid quarterly and the first portion to become payable at the end of three calendar months next after my death and the first payment of the said annuity of £—— and of the said yearly sum for maintenance to be made at the end of three calendar months next after the marriage or death of my widow

—to pay to wife marrying again a reduced annuity;

AND I FURTHER DIRECT that for so long as any child of mine shall be living and under the age of twenty-one years my trustees shall raise and pay quarterly to each daughter of mine who shall have attained the age of twenty-one years and shall not have been married the yearly sum of £—— with a proportionate part down to the cessation of such payment

—to apply after the death or marriage of wife, certain allowances for maintenance of children, according to a scale of ages;

AND UPON FURTHER TRUST (*e*) to invest in the names of my trustees the surplus which after satisfying the said annuities and all expenses incident to the execution of the trusts hereby created shall from time to time remain in their hands of the yearly produce of the said fund and to

—annuities and maintenance to be paid quarterly;

—to accumulate the surplus income for twenty-one years from testator's death,

accumulate at compound interest the income of the said aggregate fund for the term of twenty-one years from my death if any child of mine shall so long live and be under the age of twenty-one years And I DIRECT my trustees on the termination of the said term of twenty-one years determinable as aforesaid which determination is hereinafter referred to as the period of distribution to stand possessed of the said aggregate fund with the accumulations thereof but subject to such of the principal trusts hereinbefore contained anterior to the trusts for accumulation as shall be then subsisting IN TRUST for my children living at the period of distribution and the issue then living of my children dying before that period such objects to take as tenants in common according to the stocks (*f*) and not to the number of individuals composing the class the shares of children to be paid immediately and the shares of other issue being males at the age of twenty-one years or being females at that age or marriage AND if there shall not be any object of the same trust or not any such object who shall become entitled to an absolutely vested interest then UPON TRUST to divide the said trust fund equally between my brothers and sisters [*names*] who shall be deemed to have vested interests in their respective shares on my death.

if any child shall continue under age.

Trusts of the accumulated fund;

—for children and issue living at the cessation of trust for accumulation, *per stirpes*;

—if no object of the preceding trust, then for testator's brothers and sisters equally.

9. I DECLARE that it shall be lawful for my trustees at any time or times before the period of distribution to apply out of the said trust fund any sum or sums of money not exceeding in the whole £—— in or towards the establishment of each or any son of mine in any profession trade or business to be approved of by my trustees or his advancement in the world in any other manner which may appear to them expedient And also to advance to each daughter of mine who shall be married with their previous approbation in writing the sum of £—— on such her marriage (*g*) AND I DECLARE that the sums to be advanced to my said sons and daughters as aforesaid shall be taken in part satisfaction of the shares to which they or their issue may respectively become entitled of the said trust fund (*h*) PROVIDED ALSO that notwithstanding anything hereinbefore contained it shall be lawful for my trustees at any time or times until the period of distribution in their discretion to invest any part of the said trust fund or the accumulations thereof in the purchase of any estates in the county of —— of freehold tenure or held for a term or terms of years of which [fifty] years at least shall be unexpired or taking any ground or buildings in the same county on building repairing or improving leases in consideration of such fines or premiums at such rents and subject to such conditions as to my trustees shall seem expedient and the property to be so purchased and taken shall be vested in my

Power to apply a limited sum for the advancement of each child of testator.

Power to purchase real estate, and take land on building leases.

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trustees and be subject to the same trusts and provisions as my real estates hereinbefore devised.

Power to carry on building operations.

10. I DECLARE that it shall be lawful for my trustees at any time or times until the period of distribution in their discretion to prosecute or complete any buildings repairs or improvements which shall at my decease have been begun contracted for or projected by me in or upon any part or parts of my devised estates and to plan and execute any new or other buildings repairs or improvements in or upon any part or parts either of my devised estates or of the estates to be so purchased or taken as aforesaid and for those purposes to expend any part of the said trust fund and accumulations and to use and employ any materials which I shall possess or have contracted for at my death and to pull down and remove any buildings erected or to be erected upon any part of my devised estates or the estates to be so purchased or taken as aforesaid and either to use or sell the materials thereof.

Power to let houses as lodging-houses and purchase furniture, &c.

11. I DECLARE that it shall be lawful for my trustees at any time or times until the period of distribution in their discretion to let as lodging-houses any messuages erected or to be erected as aforesaid which shall have been let by me as lodging-houses or shall be adapted for that purpose upon such terms and in such manner as lettings of that nature are usually conducted in or near —— aforesaid And to invest any part of the said fund or accumulations in the purchase of furniture or other articles to be used in such lodging-houses and also to use therein the furniture and articles which shall at my death belong to any messuages then let or intended to be let as lodging-houses.

Unsold real estate to be transmissible as personal estate.

12. I DECLARE that in the meantime until the sale of my devised estates and of the estates to be purchased and taken as aforesaid the same shall for all the purposes of the trusts hereinbefore contained be considered as money or personal estate and be transmissible accordingly and the rents and profits thereof be received by my trustees and be applicable to the same purposes and in the same manner as the yearly produce of the fund to arise from the sale thereof would be applicable to and in by virtue of my will if such sale had actually taken place.

Power to allot real estate, as such, to persons entitled to shares of the trust fund.

13. I DECLARE that if at the period of distribution any real estates shall be vested in my trustees then notwithstanding the trust for sale hereinbefore contained it shall be lawful for them in their discretion to allot the same or any part or parts thereof as real estate to any object or objects of the trusts hereinbefore contained in favour of my children and issue in full or in part satisfaction of the share or respective shares of such object or objects under the same trusts according to the value of the real

estate to be so allotted such value to be ascertained by two surveyors to be appointed by my trustees or if such surveyors shall not agree thereon in writing within —— days after their appointment then by a third surveyor to be named by them as their umpire before beginning the valuation And for the convenience or equality of any such allotment or allotments to accept and make any mortgages or charges upon the allotted estates and my residuary real and personal estates respectively or any or either of them respectively And the real estate to be so allotted shall be subject to trusts corresponding as nearly as may be with the trusts hereinbefore contained concerning the share or respective shares in respect of which the allotment shall be made (*i*).

Right of pre-emption given to testator's partner as to shares of real estate belonging to the partnership.

14. I DECLARE that my trustees shall within —— calendar months next after my death cause an offer in writing to be made to my brother [*name*] of my share of the real estate belonging to us as partners in the business of —— at —— aforesaid at the value set upon the same share in the stock-book of the same partnership at the last stock-taking preceding my death PROVIDED NEVERTHELESS that if the said stock-taking shall have been taken more than twelve calendar months before my death then my share of the said real estate belonging to the said partnership shall be offered as aforesaid to my said brother at a valuation to be made by two competent and impartial persons as valuers one to be chosen by my said brother and the other by my trustees or if the said two valuers disagree by a third valuer to be chosen by the other two as their umpire before they enter upon the valuation And that if my said brother shall within one calendar month after such offer signify in writing signed by him to my trustees his desire to accept such offer then my trustees on having one moiety of the value ascertained in manner aforesaid paid or duly allowed in account to them and having the other moiety thereof either so paid or allowed or otherwise at the option of my said brother secured by a mortgage of the same share to be paid in one payment or by instalments at any period or periods not exceeding —— years from my death with interest after the rate of —— per cent. per annum shall at the costs of my said brother convey the same share to him or as he shall direct without prejudice to any mortgage to be made as aforesaid but no purchaser under my will shall be concerned to take notice of this direction.

Power enabling trustees to succeed testator in his share of partnership business.

15. I DECLARE that it shall be lawful for my trustees in their discretion until the period of distribution to enter into any arrangement with [*testator's partners*] for succeeding to my share in the business carried on by them in partnership with me at —— aforesaid and for continuing such partnership business

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for the benefit of my estate for such period and upon such terms as to my trustees shall seem expedient and to employ for that purpose all or any part of the capital which shall at my death be employed by me in the same business or any additional capital (*k*).

Power to settle partnership accounts, &c.

16. I DECLARE that it shall be lawful for my trustees to investigate arrange and settle all accounts and transactions whatsoever between me and any person or persons with whom I am or shall be concerned in any partnership or partnerships or between me and the representatives of any such person or persons and to wind up all the affairs of such partnership or partnerships and generally to do and execute all such acts matters and things as shall appear to my trustees to be necessary or expedient for effecting or facilitating the final settlement of all matters arising out of any partnership concerns in which I shall be engaged at my death or shall at any former period have been engaged.

Power to sell stock-in-trade, accept personal security and compound debts.

17. I DECLARE that it shall be lawful for my trustees at the risk of my estate to sell any part or parts of my personal estate embarked in trade at my death to any person or persons for money or upon credit and to accept such personal or other security and to give such time for payment of the same money or of any other money which shall be owing to me at my death as they in their discretion may think proper and to compromise compound or submit to arbitration any debt or claim affecting my estate.

Power to lend money to testator's son on bond.

18. I DECLARE that it shall be lawful for my trustees with the consent in writing of my wife during her widowhood and after her death or marriage in their discretion to lend to my son [*name*] at the risk of my estate any sum or sums of money not exceeding in the whole £—— sterling upon his bond at interest after the rate of five per cent. per annum for such period as my trustees shall think reasonable.

19. *Investment clause.* See note (*b*) to Prec. 4.

20. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

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(*a*) See note (*f*) to Prec. 12.

Leaseholds, reversions and remainders, pass under a general devise, when.

(*b*) The Wills Act materially affects and alters the operation of a general devise. For, before that statute, when such a devise was intended to comprise leaseholds for years, it was necessary that they should be expressly mentioned, as it would not otherwise have extended to them, unless the testator, when he made his will, had no freeholds to which the devise could apply, *Rose* v. *Bartlett*, Cro. Car. 292; Hawkins, Constr. Wills, 41; *Re Holt*, [1921] 2 Ch. 17; 90 L. J. Ch. 410. Now, however, by such a devise, leasehold lands will pass, provided the words would have been sufficient to describe them if the testator had not possessed

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freehold land (unless a contrary intention appears from the will, Wills Act, ss. 26, 27, *ante*). And, by the last of these sections, the further operation is attributed to such a devise of comprising and disposing of, by way of execution of a power, all lands to which the description shall extend, which the testator has power to appoint in any manner he thinks proper.

Reversions and remainders in fee also pass under such devises without specification, unless excluded by the inapplicability of some of the limitations in the devise, *Church* v. *Mundy*, 15 Ves. 396; *Ford* v. *Ford*, 6 Ha. 486. And on the operation of a general devise of realty, see Jarm. Wills, 945 *et seq.*

Inexpediency of associating particular with general words of description.

(*c*) It was common, in residuary clauses in wills, to find, in addition to the general words here used, a long enumeration of particulars of which the personal estate then actually did or might be supposed to consist. Of all kinds of verbosity this seems to be the most inexpedient, if not pernicious; for if these words are not absolutely nugatory (as they generally are, *King* v. *George*, 5 Ch. D. 627; 46 L. J. Ch. 670; *Re Fleetwood*, 15 Ch. D. 594; 49 L. J. Ch. 514) they sometimes give rise to the question whether the residuary legatee is not to stand in the favoured position of a specific legatee in regard to the enumerated articles; and such question becomes especially important where there is a deficiency of assets to pay all the debts and legacies. It ought always to be prevented by an unequivocal expression of intention where the residuary legatee is to take any of the personal property in the character of a specific legatee; and by framing the residuary bequest in the ordinary general and comprehensive language, where he is not.

Inalienable trust for married women.

(*d*) The wife might avoid this restriction by assigning the annuity while discovert (*ante*, p. 209); to prevent which, however, it might, in the event of her doing so, be made to cease by a clause declaring that in case she, while discovert, shall do or suffer any act or thing whereby the said annuity, or any part thereof, shall be assigned, charged, or incumbered, the same annuity shall wholly cease. Some forms in common use provide for cesser in case the woman during discoverture "shall attempt to alien or incumber." As to a proviso of forfeiture in case of doing or "attempting" to do a certain act, see *Graham* v. *Lee*, 23 Be. 388; 26 L. J. Ch. 395; *Jones* v. *Wyse*, 2 Ke. 285; 7 L. J. Ch. 107. And see Jarm. Wills, ch. 39, v.

Accumulation of income, how far restrained.

(*e*) The prospective accumulation of income was restrained by 39 & 40 Geo. 3, c. 98 (usually called the Thellusson Act, in reference to the gentleman whose extraordinary will supplied occasion for it). The statute is repealed after 1925 as regards England and Wales, and its provisions are re-enacted in a modified form by sect. 164 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), which provides:—

General restrictions on accumulation of income.

Sect. 164.—"(1.) No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely:—

"(a) the life of the grantor or settlor; or

"(b) a term of twenty-one years from the death of the grantor, settlor or testator; or

"(c) the duration of the minority or respective minorities of any person or persons living or en ventre sa mere at the death of the grantor, settlor or testator; or

"(d) the duration of the minority or respective minorities only of any

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person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

"In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.

"(2.) This section does not extend to any provision—

"(i) for payment of the debts of any grantor, settlor, testator or other person;

"(ii) for raising portions for—

"(a) any child, children or remoter issue of any grantor, settlor or testator; or

"(b) any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited;

"(iii) respecting the accumulation of the produce of timber or wood;

and accordingly such provisions may be made as if no statutory restrictions on accumulation of income had been imposed.

"(3.) The restrictions imposed by this section apply to instruments made on or after the twenty-eighth day of July, eighteen hundred, but in the case of wills only where the testator was living and of testamentary capacity after the end of one year from that date."

Sections 165 and 166 add the following qualifications and restrictions:—

Qualification of restrictions on accumulation.

Sect. 165. "Where accumulations of surplus income are made during a minority under any statutory power or under the general law, the period for which such accumulations are made is not (whether the trust was created or the accumulations were made before or after the commencement of this Act) to be taken into account in determining the periods for which accumulations are permitted to be made by the last preceding section, and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made as aforesaid during such minority."

Restriction on accumulation for the purchase of land.

Sect. 166.—"(1.) No person may settle or dispose of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

"(2.) This section does not, nor do the enactments which it replaces, apply to accumulations to be held as capital money for the purposes of the Settled Land Act, 1925, or the enactments replaced by that Act, whether or not the accumulations are primarily liable to be laid out in the purchase of land.

"(3.) This section applies to settlements and dispositions made after the twenty-seventh day of June, eighteen hundred and ninety-two."

The Thellusson Act, however, still applies to heritable property in

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Scotland (11 & 12 Vict. c. 36, s. 41); and the restrictions imposed by sect. 1 of the Thellusson Act are applicable in Scotland even to provisions for payment of debts, &c., as regards any instrument coming into operation on or after August 10, 1914, Entail (Scotland) Act, 1914, s. 9 (4 & 5 Geo. 5, c. 43).

Trusts for accumulation.

If the allowed term is exceeded, the accumulation is nevertheless good *pro tanto*, *Griffiths* v. *Vere*, 9 Ves. 127; *Longdon* v. *Simson*, 12 Ves. 295; *Re Lady Rosslyn's Trust*, 16 Sim. 391; 18 L. J. Ch. 98; but a trust for accumulation which was bad before the statute is of course still so, *Boughton* v. *James*, 1 Col. 26; *Boughton* v. *Boughton*, 1 H. L. C. 406; *Browne* v. *Stoughton*, 14 Sim. 369; *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; 19 L. J. Ch. 126. And a trust which is not void as a perpetuity may yet be void for uncertainty, *Re Moore*, [1901] 1 Ch. 936; 70 L. J. Ch. 358.

Implied trusts.

Implied no less than express trusts are within the statute. Thus, by way of illustrating both these positions, suppose a testator to give his real and personal estate to such of the children of A. as shall attain the age of twenty-one years. This would create an implied accumulating trust until the vesting of the gift, which, if A. had no child at the testator's decease, would exceed the allowed limit; and the effect would be that for twenty-one years from the testator's death the accumulation would proceed under the authority of the statute; and from that period until the vesting, the income of the realty would go to the testator's heir as real estate undisposed of, and the income of the personalty to the next of kin as personal estate undisposed of. And where a testator creates a charge which has the effect of carrying an accumulation for a period exceeding the statutory limit, it will be *pro tanto* void, though the testator has not in terms directed that the income shall accumulate, *Shaw* v. *Rhodes*, 1 M. & C. 135; *Evans* v. *Hellier*, 5 C. & F. 114; *Tench* v. *Cheese*, 6 D. M. & G. 453; 24 L. J. Ch. 716; *Morgan* v. *Morgan*, 4 De G. & S. 164; 20 L. J. Ch. 109, 441. See also 5 Dav. Conv. 328. But where, subject to a direction to accumulate, real estate is devised to several in succession, the direction to accumulate operates as a charge on the successive estates, and accumulations made after twenty-one years from the testator's death belong not to his heir-in-law, but from time to time to the several persons entitled to the rents and profits, *Re Clulow's Trust*, 1 J. & H. 639; 28 L. J. Ch. 696; and see *Wharton* v. *Masterman*, [1895] A. C. 186; 64 L. J. Ch. 369.

Trusts for accumulation.

A trust for accumulation, however short, will be void unless it falls within twenty-one years from the testator's decease, or constitutes one of the alternative purposes or periods of accumulation allowed by the statute. For instance, if a testator should give his real and personal estate to A. for life, and then to such of the children of B. as during the life of A. or afterwards should attain the age of twenty-one years, accumulation would not be allowed for twenty-one years from the decease of A., but only for so much, if any, of the term of twenty-one years, computed from the testator's decease, as should happen to be unexpired at A.'s decease, *Att.-Gen.* v. *Poulden*, 3 Ha. 555. It will be observed that the Act authorises accumulation during any of the four periods, and only for one of those periods, *Wilson* v. *Wilson*, 1 Sim. (N.S.) 288; 20 L. J. Ch. 365; *Jagger* v. *Jagger*, 25 Ch. D. 729; 53 L. J. Ch. 201. The last mentioned of the alternative periods is the minority of any person, who, under the uses or trusts, would, if of full age, be entitled to the rents, &c.; which clause is not confined to the minority

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of persons born in the lifetime of the testator, but extends to the minorities of persons born after his death and also to successive minorities, *Re Cattell*, [1914] 1 Ch. 177; 83 L. J. Ch. 322.

In *Re Pope*, [1901] 1 Ch. 64; 70 L. J. Ch. 26, the question was whether certain surplus rents accumulated under a trust for accumulation were to be treated, after the permitted period of accumulation, as capital or income. See *Re Hawkins*, [1916] 2 Ch. 570; 86 L. J. Ch. 25; *Re Garside*, [1919] 1 Ch. 132, where *Re Pope* was not followed.

On the question whether accumulations, not expressly directed by the will, but arising by operation of law, are within the Act, see *Mathews* v. *Keble*, L. R. 3 Ch. 691; 37 L. J. Ch. 657. As to accumulations of a fund which was charged on real estate in exercise of a power, see *Simmons* v. *Pitt*, L. R. 8 Ch. 978; 43 L. J. Ch. 267.

As before intimated, of a trust for accumulation which before the Thellusson Act would have been good, "so much as is now within the Act will be good, but the excess will be bad; but if there be a trust for accumulation, and part of it would have been bad before the Act, that part remains bad notwithstanding the Act"; *per* Lord Eldon, in *Marshall* v. *Holloway*, 2 Sw. 450. The period for the distribution of accumulations is not accelerated by the operation of the Act in shortening the time during which such accumulations are to be made, *Nettleton* v. *Stephenson*, 3 De G. & S. 366; 18 L. J. Ch. 191. As to stopping accumulation, to which, at the end of the period allowed by the Act, certain charities would be entitled, see *Wharton* v. *Masterman*, [1895] A. C. 186; 64 L. J. Ch. 369.

Accumulations allowed; for payment of debts,

As to the exceptional cases in which accumulations are permitted: (1) for the payment of debts. The doctrine of Sir G. J. Turner, V.-C., in *Lord Barrington* v. *Liddell*, 10 Ha. 429; 22 L. J. Ch. 1, that the debts provided for must be the debts of the testator himself, was overruled by Lord St. Leonards, 2 D. M. & G. 480. Accumulation for payment of debts and legacies for a period of thirty years has been held allowable, the legacies being to persons in existence, *Williams* v. *Lewis*, 6 H. L. C. 1013; 28 L. J. Ch. 505. See also, as to provisions for the payment of debts, *Bateman* v. *Hotchkin*, 10 Be. 426; 16 L. J. Ch. 514; *Varlo* v. *Faden*, 1 D. F. & J. 211; 29 L. J. Ch. 230; *Tewart* v. *Lawson*, L. R. 18 Eq. 490; 43 L. J. Ch. 673; *Re Heathcote*, [1904] 1 Ch. 826; 73 L. J. Ch. 543; *Re Baroness Llanover*, [1907] 1 Ch. 635; 76 L. J. Ch. 427.

for raising portions for children.

(2) As to the exception in favour of portions, and what constitutes a portion within the meaning of the Act, see *Re Stephens*, [1904] 1 Ch. 322; 73 L. J. Ch. 3; Jarm. Wills, 383 *et seq.*; *Re Elliott*, [1918] 2 Ch. 150; 87 L. J. Ch. 449.

Neither the Thellusson Act nor the Law of Property Act, 1925, is applicable to real estate in Ireland or to the rents thereof, but the Thellusson Act is applicable to the income arising from accumulations of such rents: see *Ellis* v. *Maxwell*, 12 Be. 104; 10 L. J. Ch. 266. The Thellusson Act was held to apply to chattels real situate in England, though the testator was domiciled in Ireland, *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461.

A direction by will to pay the premiums on a life-insurance policy is valid for the whole life insured, and is not an accumulation restricted by the Act to twenty-one years, *Bassit* v. *Lister*, 9 Ha. 177; 20 L. J. Ch. 641.

Nor is a trust in a will for the application of the income of an estate "in the improvement of the landed estate, and in maintaining in good

habitable repair houses and tenements on the property" a trust for accumulation of the income within the Act. Such a trust is valid, and the income may therefore be so applied although the period of twenty-one years from the death of the testator may have expired, *Vine* v. *Raleigh*, [1891] 2 Ch. 13; 60 L. J. Ch. 675; *Re Mason*, [1891] 3 Ch. 467; 61 L. J. Ch. 25.

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A direction in a will to apply a portion of the rents of the testator's leaseholds in keeping on foot a policy of insurance to secure the replacement at the expiration of the terms for which the lease was held of the capital which would be lost by not selling the leaseholds is not an accumulation within the meaning of the Act, and is therefore valid notwithstanding that at the testator's death the unexpired residue of the term may exceed twenty-one years, *Re Gardiner*, [1901] 1 Ch. 697; 70 L. J. Ch. 407.

See further, on the subject of accumulations and the Thellusson Act, the notes to *Griffiths* v. *Vere*, 9 Ves. 127, in Tud. L. C. R. P.; Jarm. Wills, ch. 11.

By the Accumulation Act, 1892 (55 & 56 Vict. c. 58), now replaced by sect. 166 of the Law of Property Act, 1925, *ante*, p. 310, accumulation was further restricted. A direction to accumulate for the purchase of real estate was a direction to accumulate "for the purchase of land only" within the meaning of that Act, and was consequently void, *Re Clutterbuck*, [1901] 2 Ch. 285; 70 L. J. Ch. 614.

Subject to these statutory provisions, the intermediate income of contingent and future gifts, unless otherwise disposed of, passes with a devise or bequest in a will coming into operation after 1925, under sect. 175 of the Law of Property Act, 1925, which provides:—

Contingent and future testamentary gifts to carry the intermediate income.

Sect. 175.—"(1.) A contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of.

"(2.) This section applies only to wills coming into operation after the commencement of this Act."

(*f*) These words apply to every generation; all who take must do so according to the stocks, and this runs through the whole range of the descents, *Robinson* v. *Shepherd*, 4 D. J. & S. 129; not followed in *Gibson* v. *Fisher*, L. R. 5 Eq. 51; 37 L. J. Ch. 67; but followed in *Re Wilson*, 24 Ch. D. 664; 53 L. J. Ch. 130; and *Re Dering*, 105 L. T. 404; See these cases discussed in *Re Alexander*, [1919] 1 Ch. 371; 88 L. J. Ch. 242.

As to conditions restraining marriage.

(*g*) By the civil law, conditions restraining marriages were absolutely void, and marriage generally was a sufficient compliance with a condition requiring marriage with consent, or with a designated individual, or in certain other prescribed circumstances (Godolph. p. 3, c. 17). Our law has not evinced the same impatience of nuptial restrictions; for it is clear that a condition is legal which inhibits marriage until majority or any other reasonable age, or which requires consent, or restrains marriage with any particular individual, or even with a very large class, for instance, a native of Scotland, *Perrin* v. *Lyon*, 9 Ea. 170; or a Papist, *Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 295. See also *Hodgson* v.

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Halford, 11 Ch. D. 959; 48 L. J. Ch. 548, where a forfeiture on marriage with a Christian took effect; and *Jenner* v. *Turner*, 16 Ch. D. 188; 50 L. J. Ch. 161, where a condition restraining marriage with a domestic servant was held valid. And see *Re Bathe*, [1925] 1 Ch. 377.

Gift until marriage, valid.

The law of England does not prohibit the gift of an annuity or other interest in the income of property, real or personal, until marriage; for this may be a good conditional limitation, *Adams* v. *Adams*, [1892] 1 Ch. 369; 61 L. J. Ch. 237. See as to distinction between a limitation and a condition, *Re Moore*, 39 Ch. D. 116; 57 L. J. Ch. 936; *Re Lovell*, [1920] 1 Ch. 122; 88 L. J. Ch. 540.

Efficacy of gift over in rendering condition to ask consent effective.

The law of England, however, has admitted the principle of the civil law to this extent, that it treats as nugatory a condition attached to a gift of personalty to ask consent, unless accompanied by a bequest over in default, *Bellasis* v. *Ermine*, 1 Ch. Cas. 22; *Aston* v. *Aston*, 2 Ver. 452; *Clarke* v. *Parker*, 19 Ves. 1; so, also, if the gift is a mixed fund, consisting of personalty and proceeds of sale of realty, *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255; 21 L. J. Ch. 596; *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510; 43 L. J. Ch. 669; and it would seem that the condition would be void if the gift were of proceeds of sale of realty only. And a residuary bequest is not considered such a bequest over, *Semphill* v. *Bayley*, Pre. Ch. 562; *Paget* v. *Haywood*, cited 1 Atk. 378; *Scott* v. *Tyler*, 2 Br. C. 431; unless there is an express direction that the forfeited legacy shall fall into the residue, *Wheeler* v. *Bingham*, 3 Atk. 364;

Personalty.

Lloyd v. *Branton*, 3 Mer. 108. And a condition subsequent making marriage at any age without consent a cause of forfeiture is, as to personalty, valid where there is a gift over, *Re Whiting's Settlement*, [1905] 1 Ch. 96; 74 L. J. Ch. 207. See *Re Elliott*, [1918] 1 I. R. 41; and see the authorities discussed in *Re Hewett*, [1918] 1 Ch. 458; 87 L. J.

Realty.

Ch. 209. And as to land, it is valid as a limitation without a gift over. See *Fry* v. *Porter*, 1 Mod. 300. Conditions precedent to marry with consent where there is no gift over are void except in the three following

Instances of condition requiring consent to marriage being valid without a bequest over.

cases. 1*st*. Where the legatee takes an alternative legacy, *i.e.*, a legacy in the event of not marrying with consent, *Creagh* v. *Wilson*, 2 Ver. 572; *Gillet* v. *Wray*, 1 P. W. 284; *Re Nourse*, [1899] 1 Ch. 63; 68 L. J. Ch. 15. 2*ndly*. Where marriage with consent is only one of two events on the happening of either of which the legatee will be entitled to the legacy; as where it is given on the attainment of a particular age or marriage with consent, which shall first happen, *Hemmings* v. *Munckley*, 1 Br. C. 304; 1 Cox, 38; or on attaining a particular age unmarried, or marrying

Death of persons whose consent is required.

with consent before such age, *Scott* v. *Tyler*, 2 Br. C. 431. Where the consent of certain persons is required, and they die before the time for asking their consent arrives, the condition becomes impossible, and the legatee takes the legacy. If the consent of several is required and one of them dies, the consent of the survivors must be obtained, *Graydon* v. *Hicks*, 2 Atk. 18; *Grant* v. *Dyer*, 2 Dow. 74; *Aislabie* v. *Rice*, 3 Mad. 256; *Dawson* v. *Oliver-Massey*, 2 Ch. D. 753; 45 L. J. Ch. 519. Where the marriage is to be with consent of her guardian or guardians, marriage without the consent of any guardian, there being none, is not a compliance with the condition, since guardians might be appointed by the Court, *Re Brown's Will*, 18 Ch. D. 61; 50 L. J. Ch. 724. 3*rdly*. Where marriage with consent is confined to marriage during minority, *Stackpole* v. *Beaumont*, 3 Ves. 89; or other reasonable age; see *Younge* v. *Furse*, 8 D. M. & G. 756; 26 L. J. Ch. 352, where a condition in restraint of marriage before twenty-eight was held valid.

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In these several excepted instances the legatee must strictly comply with the condition which the testator has annexed to his bounty, even though there is no bequest over in default.

Marriage conditions in reference to real estate.

It is satisfactory to find that the numerous and refined distinctions respecting marriage conditions, and the efficacy of a gift over on non-compliance with the conditions, which have obtained in regard to personal legacies, have not been applied to devises of real estate, including under this denomination pecuniary charges on land. Real estate is governed by the rules of the common law, and never having been subject to the jurisdiction of the Ecclesiastical Courts, is not influenced by the rules of the civil law, *Jones* v. *Jones*, 1 Q. B. D. 279; 45 L. J. Q. B. 166. A condition prohibiting marriage generally is void as being against public policy, whether the gift to which it is attached be of realty or personalty, *Perrin* v. *Lyon*, 9 Ea. 183; *Morley* v. *Rennoldson*, 2 Ha. 570; 12 L. J. Ch. 372 (which case was again before the Court, [1895] 1 Ch. 449; 64 L. J. Ch. 485); but a condition in restraint of second marriage is not void, in the case either of a woman, *Newton* v. *Marsden*, 2 J. & H. 356; 31 L. J. Ch. 690; or of a man, *Allen* v. *Jackson*, 1 Ch. D. 399; 45 L. J. Ch. 310. An interesting instance of an unavailing effort to avoid the condition restraining a second marriage is given in *Re Rutter*, [1907] 2 Ch. 592; 77 L. J. Ch. 34. A covenant by a spinster not to revoke her will is not void on the ground that, marriage being a revocation, such a covenant is in restraint of marriage, *Robinson* v. *Ommanney*, 23 Ch. D. 285; 52 L. J. Ch. 440. A devise on condition of marrying with consent—such restraint of marriage being particular, a partial and reasonable restraint, and the condition being precedent—will not take effect unless the condition is strictly complied with, whether there is a devise over or no, *Poulet* v. *Poulet*, 1 Ver. 204; *Lord Salisbury's Case*, 2 Ven. 397; *Bertie* v. *Lord Falkland*, 3 Ch. Cas. 129; *Pulling* v. *Reddy*, 1 Wils. 21; *Harvey* v. *Aston*, 1 Atk. 361; and if marriage with consent is a condition subsequent, a breach of the condition will divest the estate, *Fry* v. *Porter*, 1 Ch. Cas. 138; unless the condition becomes impossible to be performed, in which case the estate becomes absolute. It may happen that a sum of money payable out of land on marriage with consent, in aid of the personal estate, may at one and the same time fail as a charge on the realty, and yet be payable as a personal legacy. Such an instance occurred in *Reynish* v. *Martin*, 3 Atk. 330, where a testatrix willed that if her daughter Mary married with the consent of her trustees, then, and not otherwise, she gave her £800; and the legatee was also to receive £30 yearly while sole and unmarried; the testatrix charged her real estate with legacies; Mary married without consent, and Lord Hardwicke held that the £800 was payable as a legacy of personal estate, but not as a charge upon the realty.

Marriage conditions.

Where a testator devised real estate to his son and limited the same "if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants," the son having married such a gentlewoman and having complied with the condition, it was held that an estate in special tail male was created, *Pelham-Clinton* v. *Duke of Newcastle*, [1903] A. C. 111; 72 L. J. Ch. 424.

Effect of circumstances occurring in the testator's lifetime.

A change of circumstances in the lifetime of the testator sometimes has a material effect upon conditions restraining marriage. Thus, if a parent gives a legacy to his daughters, provided they marry with the consent of his trustees, this proviso would be held not to apply to a daughter who had subsequently married in his lifetime with his own

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consent, *Re Park*, [1910] 2 Ch. 322; 79 L. J. Ch. 502; and see *Re Grove*, [1919] 1 Ch. 249; even though the testator's approbation was posterior to the marriage, *Wheeler* v. *Warner*, 1 S. & S. 304; or though the daughter was a widow at his death, *Crommelin* v. *Crommelin*, 3 Ves. 227. Also where under a clause in a will the interest of a child of the testator who should contract a marriage forbidden by the will was "thenceforth to cease and determine," it was held that such a restriction did not apply to the child who after the date of the will, but before the testator's death, had contracted a forbidden marriage, *Chapman* v. *Perkins*, [1905] A. C. 106; 74 L. J. Ch. 331. The consent of parents is construed as the consent of parents or parent, if any, *Dawson* v. *Oliver Massey*, 2 Ch. D. 753; 45 L. J. Ch. 519; *secus*, in the case of guardians, *Re Brown's Will*, 18 Ch. D. 61; 50 L. J. Ch. 724. A gift over after the death or re-marriage of the testator's wife to the children living at her death was held to devolve upon the class of persons who were living on her re-marriage, *Re Warner*, [1917] W. N. 374. And see where a gift over on re-marriage was held to take effect on death, *In b. Griffiths*, [1917] P. 59; 86 L. J. P. 42.

Enough has been stated to show the necessity for care and explicitness in preparing marriage conditions, and that, to render conditions requiring consent effectual, where annexed to bequests of personal property, they should be accompanied (unless in the excepted cases before noticed) with an express bequest over in the event of marriage without consent. Indeed, considering the litigation to which conditions requiring consent have given rise (for the present note embraces only a small portion of the questions that have been raised concerning them), and the nature of the duty which they impose upon, and of the power which they place in the hands of, trustees, it seems in general the more prudent course not to encourage testators in the imposition of such restraints.

Scott v. *Tyler* is the leading case on the validity or invalidity of conditions in restraint of marriage annexed to a gift. See that case, and the notes thereto, in 2 Wh. & Tud. L. C. Eq. See also Jarm. Wills, ch. 39, x.

(*h*) A power of advancement to the extent of one-half of the share or interest is conferred upon the trustees, where the trust is constituted or created after 1925, by sect. 32 of the Trustee Act, 1925 (15 Geo. 5, c. 19).

Discretionary powers of settlement.

(*i*) As to discretionary powers of making settlements vested in trustees, see *Lancashire* v. *Lancashire*, 2 Ph. 657; 17 L. J. Ch. 270; *White* v. *Briggs*, 2 Ph. 583; 17 L. J. Ch. 196. In cases of executory trusts, the Court moulds the trusts in accordance with the intention of the creator of the trusts, which intention, in the case of executory trusts in wills, must be gathered from the words of the will alone. Where the trusts and limitations of land to be purchased by the trustees are expressly declared by the testator, the Court has no authority to make them different from what they would be at law, *Austen* v. *Taylor*, 1 Ed. 361; *Fullerton* v. *Martin*, 1 Dr. & S. 31; 29 L. J. Ch. 469. But the general intent of a testator in creating an executory trust governs the preparation of the settlement, and the manner of executing the trust must be guided by the object of the author of the trust, if such object can be legally carried into effect, *Sackville-West* v. *Viscount Holmesdale*, L. R. 4 H. L. 543; 39 L. J. Ch. 505; and see *Viscount Holmesdale* v. *West*, L. R. 12 Eq. 280; 40 L. J. Ch. 795; and if the testator has not been his own conveyancer, and has left his intention to be made out from

Executory trusts in wills of realty.

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general expressions, the Court is not bound to construe technical terms with legal strictness, *Egerton* v. *Earl Brownlow*, 4 H. L. C. 1; 23 L. J. Ch. 348; *Thompson* v. *Fisher*, L. R. 10 Eq. 207; *Leonard* v. *Earl of Sussex*, 2 Ver. 526; *Bastard* v. *Proby*, 2 Cox, 6; *Rochfort* v. *Fitzmaurice*, 2 Dr. & War. 1; *Shelton* v. *Watson*, 16 Sim. 543; 18 L. J. Ch. 223; *Re Howarth*, [1916] W. N. 50; *Grier* v. *Grier*, L. R. 5 H. L. 688. Where an executory trust, if carried out literally, would be void, as, *e.g.*, for infringing on the rule against perpetuities, the Court will execute the trust *cy-près*, and direct a settlement as strict as the law allows, *Humberston* v. *Humberston*, 1 P. W. 332.

Cy-près.

Insertion of "usual powers."

Where a settlement is directed with the usual or proper powers, the Court will order the insertion of such powers as are necessary, and contribute to the better enjoyment of the estate, and are advantageous to all parties interested; see *Hill* v. *Hill*, 6 Sim. 144; but powers conferring personal advantages on particular persons, such as a power to jointure a future wife, *Duke of Bedford* v. *Marquess of Abercorn*, 1 M. & C. 312; 5 L. J. Ch. 230; or to raise portions, *Higginson* v. *Barneby*, 2 S. & S. 516, will not be inserted; and life estates will not be without impeachment of waste, *Davenport* v. *Davenport*, 1 H. & M. 775; 32 L. J. Ch. 33; *Stanley* v. *Coulthurst*, L. R. 10 Eq. 259; 39 L. J. Ch. 650. See also *Clive* v. *Clive*, L. R. 7 Ch. 433; 41 L. J. Ch. 386, as to the inconsistency of a restraint on anticipation with a life estate without impeachment of waste. As to the insertion of powers where no direction to that effect is given, see *Wheate* v. *Hall*, 17 Ves. 85; *Brewster* v. *Angell*, 1 J. & W. 625; *Turner* v. *Sargent*, 17 Be. 515; *Byam* v. *Byam*, 19 Be. 58; 24 L. J. Ch. 209; *Wise* v. *Piper*, 13 Ch. D. 848; 49 L. J. Ch. 611.

See also Peachey, Settlements, p. 88; Vaizey on Settlements, ch. 4, sect. iii.; the notes to *Lord Glenorchy* v. *Bosville*, Ca. t. Talb. 3, in 1 Wh. & Tud. L. C. Eq.; and the Settled Land Act, 1925 (15 Geo. 5, c. 18); and Jarm. Wills, ch. 24, iv., and ch. 48, ii.; and *Re Howarth*, [1916] W. N. 50. And as to simple appropriation in satisfaction of a share, see note (*y*), *post*, p. 396.

(*k*) See note (*a*), Prec. 23.

No. XXVI.

PREC. 26.

WILL *of a* FARMER *disposing of his Personal Property in favour of his Wife and infant Children.—Legacies to Children at Twenty-one or Marriage.—The Wife to be sole Trustee and Executrix during Widowhood; with large discretionary Powers to carry on the Farming Business, and manage the Estate generally.—Wife marrying to have an Annuity; on her death or Marriage the Property is vested in Trustees for the Benefit of the Children.*

THIS IS THE LAST WILL of me [*testator's name residence and quality.*]

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

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Appointment of executors, trustees and guardians.

2. I APPOINT my wife [*name*] during her widowhood sole executrix and trustee of this my will and on her death or remarriage whichever shall first happen I APPOINT my friends [*names &c.*] to be executors and trustees of this my will and guardians of my infant children (*a*).

Portions to sons at twenty-one, daughters at twenty-one or marriage.

3. I GIVE to each child of mine who being a son shall at my death have attained the age of twenty-one years or shall afterwards attain that age or being a daughter shall at my death have attained that age or have been married or shall afterwards attain that age or be married a portion of [£——] to be paid to children being at my death objects of this gift at the end of six calendar months after that event and to children subsequently becoming objects thereof at the end of six calendar months after they shall respectively become such objects but advances (*b*) made by me to any child or children in my lifetime shall according to the amount thereof be taken in full or in part satisfaction of his her or their portion or portions unless I shall otherwise declare by codicil to this my will (*c*).

Wife empowered to carry on farm.

4. I EMPOWER my said wife [*name*] to carry on my farming and grazing business and for that purpose to continue tenant of the farm which I shall use at my death or to hire and use any other farm and employ my live and dead agricultural stock (*d*) and such part of my personal estate as she shall think fit with liberty for her at any time to transfer the business to any son or sons of mine or admit any son or sons of mine to a share thereof and lend to him or them the capital employed or requisite to be employed therein or any part thereof upon such security and such terms as she shall think reasonable.

Wife empowered to manage and invest the personal estate at her discretion.

5. I EMPOWER my said wife to manage my personal estate generally in such manner as shall appear to her to be most advantageous to my family with liberty at her discretion either to permit it to continue in the state in which it shall be found at my death or to get it in and invest the proceeds in her name upon any stocks funds or securities or at any rate of interest or in the purchase of any real or personal property and to vary the investment when and as she shall think fit but any real property so purchased shall be held upon trust for sale (*e*) and be considered as converted into and treated as personalty for all the purposes of my will.

Wife to take the profits and income, bringing up the infant children except married daughters.

6. I GIVE to my said wife all the income of so much of the personal estate to which I shall be entitled at my death as shall be in anywise employed or invested inclusive of the profit of the said business and also the use of the residue thereof but charged with the maintenance education and bringing up in a manner suitable to their station in life of my sons for the time being

under the age of twenty-one years and my daughters for the time being under that age not being or having been married.

Wife marrying again to receive an annuity for her separate use and deliver up the trust property.

7. In the event of my said wife marrying again I henceforth ANNUL the powers and benefits hereinbefore given to her and GIVE to her an annuity of £—— during the remainder of her life payable quarterly into her proper hands and on her personal receipt as a separate and inalienable provision the first payment to accrue due and be made at the end of three calendar months after her marriage if she shall within that time account for and deliver up my personal estate in her hands to the other trustees or trustee for the time being of my will to their or his satisfaction and if not then at the end of three calendar months after such accounting and delivery.

Cesser of annuity on alienation.

8. I DECLARE that if my said wife shall either before or after such her second marriage do or suffer any act or thing whereby her said annuity of £—— or any part thereof shall be aliened or incumbered the same annuity shall thereupon cease.

On wife's death or marriage, the property to vest in other trustees;

their powers and duties as to farming, converting, and investing.

9. I DECLARE that on the death or marriage of my said wife my personal estate shall vest in the other trustees or trustee for the time being of my will who shall have the same power and liberty in regard to my business as I have given to my said wife by clause 4 of this my will of carrying on the same for such period as the circumstances of my estate or my family shall in the opinion of my said trustees or trustee render it convenient or desirable so to do and subject thereto shall convert or get in my personal estate not invested in authorised trust investments and invest and place out the produce in and upon authorised trust investments but with liberty to continue any investments of a different description which they or he shall think it inexpedient to disturb (*f*).

Trust property given on death or marriage of wife to children equally;

—accruer;

—maintenance and advancement.

10. I DECLARE that the said trustees or trustee shall hold my personal estate from and after the death or marriage of my said wife IN TRUST for my child if only one wholly or all my children if more than one equally to be absolutely vested in a son at the age of twenty-one years and in a daughter at that age or marriage And as to the share or shares original and accruing of a son or sons dying under that age and of a daughter or daughters dying under that age without having been married IN TRUST for the other or others of my children conformably to the preceding trust With power for the said trustees or trustee to apply the whole or part of the income and any part not exceeding two-thirds (*g*) of the capital of each child's original and accruing share not absolutely vested for his or her benefit by way of maintenance advancement or otherwise and the unapplied

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income of each such share shall be accumulated and the accumulations be deemed an accretion to the same share.

IN WITNESS &c.

NOTES to Precedent 26.

(*a*) See note (*a*) to Prec. 22, and note (*f*) to Prec. 12.

As to ademption of legacies to children by advancements.

(*b*) Where a testator, subsequently to the date of his will, advances, on marriage or otherwise, a sum of money to a child to whom he has bequeathed a pecuniary legacy, the advancement will be a satisfaction either wholly or *pro tanto*, as the case may be, *Ex parte Pye*, 18 Ves. 140; *Rawlins* v. *Powel*, 1 P. W. 299; *Thellusson* v. *Woodford*, 4 Mad. 420; *Pym* v. *Lockyer*, 5 M. & C. 29; 10 L. J. Ch. 153; *Leighton* v. *Leighton*, L. R. 18 Eq. 458; 43 L. J. Ch. 594; *Re Furness*, [1901] 2 Ch. 346; 70 L. J. Ch. 580; but not if the legacy is of something different from the advancement, as, where one is of an annuity and the other is of a gross sum, *Holmes* v. *Holmes*, 1 Br. C. 555; not even where the subject-matter of each is the same, if they are made *diverso intuitu*, *Roome* v. *Roome*, 3 Atk. 181; *Bell* v. *Coleman*, 5 Mad. 24; nor where the advancement is subject to a contingency not affecting the legacy, *Spinks* v. *Robins*, 2 Atk. 491; *Crompton* v. *Sale*, 2 P. W. 553. The rule established in *Holmes* v. *Holmes*, *ubi sup.*, that the presumption against double portions will not prevail where the testamentary portion and the subsequent advancement are not *ejusdem generis*, has been left untouched by modern decisions, *Re Jaques*, [1903] 1 Ch. 267; 72 L. J. Ch. 197. Also the legal presumption that an advancement is an ademption *pro tanto* of a legacy left to a child by will may be rebutted when all the circumstances and the manner of the gift are taken into consideration, *Re Scott*, [1903] 1 Ch. 1; 72 L. J. Ch. 20. A bequest of a residue or part of a residue (being of uncertain amount) is adeemed by a subsequent advancement of a portion, *Montefiore* v. *Guedalla*, 1 D. F. & J. 93; 29 L. J. Ch. 65; *Schofield* v. *Heap*, 27 Be. 93; 28 L. J. Ch. 104; *Beckton* v. *Barton*, 27 Be. 99; 28 L. J. Ch. 673. See also *Dawson* v. *Dawson*, L. R. 4 Eq. 504; *Nevin* v. *Drysdale*, L. R. 4 Eq. 517; 36 L. J. Ch. 662; *Stevenson* v. *Masson*, L. R. 17 Eq. 78; 43 L. J. Ch. 134; but small sums doled out by the testator at different times are not taken into account, *Watson* v. *Watson*, 33 Be. 574; *Re Peacock's Estate*, L. R. 14 Eq. 236. And advances are only brought into account as between the children themselves, not for the benefit of a tenant for life of half the residue, *Meinertzagen* v. *Walters*, L. R. 7 Ch. 670; 41 L. J. Ch. 801; see also *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343; 44 L. J. Ch. 367; *Re Heather*, [1906] 2 Ch. 230; 75 L. J. Ch. 568.

Ademption by advancement.

The doctrine of ademption of legacies founded on parental or *quasi*-parental relation applies also to cases where a moral obligation other than parental or *quasi*-parental is recognised in the will, though without reference to any special application of the money, *Re Pollock*, 28 Ch. D. 552; 54 L. J. Ch. 489.

Adeemed legacy not revived by codicil.

A legacy which has been adeemed by an advancement is not revived by a codicil subsequent to the advancement, even though the codicil confirms the will and all the bequests therein, *Powys* v. *Mansfield*, 3 M. & C. 376; 7 L. J. (N.S.) Ch. 9; *Montague* v. *Montague*, 15 Be. 565. See also *Re Smythies*, [1903] 1 Ch. 259; 72 L. J. Ch. 216; *Re Aynsley*, [1914] 2 Ch. 422; 83 L. J. Ch. 807; [1915] 1 Ch. 172; 84 L. J. Ch. 211.

Perhaps it may be stated generally, that where a testator has

bequeathed a sum of money for a specific purpose, and has afterwards himself expended the money in effecting such purpose, the legacy is satisfied, see *Pankhurst* v. *Howell*, L. R. 6 Ch. 136; *Re Corbett*, [1903] 2 Ch. 326; 72 L. J. Ch. 775; *Re Jupp*, [1922] 2 Ch. 359; 91 L. J. Ch. 572; but cases of this kind seem to be distinct from the general doctrine of satisfaction before stated, which is applicable exclusively to legacies by parents, or persons standing *in loco parentis*: on which ground bequests by a putative father, *Debeze* v. *Mann*, 2 Br. C. 165; or by a grandfather in the lifetime of a father, *Roome* v. *Roome*, 3 Atk. 183, have been held not to be satisfied by subsequent advancements, and see *Re Dawson*, [1919] 1 Ch. 102; but it would seem, according to the doctrine of *Powys* v. *Mansfield*, 3 M. & C. 359; 7 L. J. (N.S.) Ch. 9, that the existence of the father does not preclude its being shown, even by extrinsic evidence, to have been the actual intention of the testator to assume the parental office in regard to the duty of providing for the objects in question.

See further, as to the satisfaction or ademption of a legacy by a portion, the notes to *Ex parte Pye*, 18 Ves. 140, in 2 Wh. & Tud. L. C. Eq.

(*c*) Subsequent unattested statements in testator's handwriting are admissible as evidence of the amount of the advances, *Whateley* v. *Spooner*, 3 K. & J. 542; see also *Hall* v. *Hill*, 1 Dr. & War. 94; *Kirk* v. *Eddowes*, 3 Ha. 509; 13 L. J. Ch. 402; *Re Shields*, [1912] 1 Ch. 591; 81 L. J. Ch. 370. In the absence of any direction by the testator, the advances bear no interest up to his death, but the advanced child is charged with interest at 4 per cent. per annum from the testator's death, *Re Davy*, [1908] 1 Ch. 61; 77 L. J. Ch. 67; or from the death of a tenant for life, *Re Rees*, 17 Ch. D. 701; 50 L. J. Ch. 328. And see *Re Young*, [1914] 1 Ch. 581; affirmed, *ibid.* 976; 83 L. J. Ch. 453; *Re Cooke*, [1916] 1 Ch. 480; *Re Tod*, [1916] 1 Ch. 567. In *Re Aird's Estate*, 12 Ch. D. 291; 48 L. J. Ch. 631, testator by codicil recited that he had advanced a certain sum to a legatee, and directed that sum to be considered as payment on account of the legacy given by his will: it was held, that the sum must be deducted, though a smaller sum had in fact been advanced. See also *Smith* v. *Conder*, 9 Ch. D. 170; 47 L. J. Ch. 878. *Re Aird* was followed by North, J., in *Re Wood*, 32 Ch. D. 517; 55 L. J. Ch. 720; and he there held, that *Re Aird* had not been overruled by the Court of Appeal in *Re Taylor's Estate*, 22 Ch. D. 495, but that this last case had been decided merely on the very special words of the will and codicil there in question. See *Re Kelsey*, [1905] 2 Ch. 465; 74 L. J. Ch. 701. Where advances were made by the trustees of a will under powers of advancement therein contained, it was held by the Court of Appeal, *Re Dallmeyer*, [1896] 1 Ch. 372; 65 L. J. Ch. 201, that the son advanced should not be debited with interest on the advances made to him in respect of the period prior to the period of distribution. See *Re Forster-Brown*, [1914] 2 Ch. 584; *Re Cooke*, [1916] 1 Ch. 480.

Evidence of advances.

Interest on advances.

(*d*) As between the heir and executor, emblements belonged to the executor, but as between an executor and a devisee, they belong to the devisee, unless they are expressly bequeathed, Co Litt. 55 b, n. by Harg. & Butl.; Shep Touch. 472. Under a will in which there was a specific devise to A. of land, and a bequest to B. of "all my personal estate and effects whatsoever and wheresoever not hereinbefore specifically bequeathed," it was held that the emblements passed with the land to A., *Cooper* v. *Woolfit*, 2 H. & N. 122; 26 L. J. Ex. 310.

Emblements;

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—comprise what.

Emblements comprise not only corn crops, but also hops, saffron, flax, and hemp, 4 Burn's Eccl. L. 299; and the law of emblements extends also (it would seem) to artificial grasses, clover, saintfoin, and the like, *Graves* v. *Weld*, 5 B. & Ad. 105; 2 L. J. (N.S.) K. B. 176; to roots in gardens, as turnips, carrots, potatoes, Co. Litt. 55 b; *Evans* v. *Roberts*, 5 B. & C. 832; 4 L. J. K. B. 313; and generally to whatever is produced for annual profit by labour and cultivation. But the law of emblements does not extend to produce beyond that of the current year, see *Graves* v. *Weld, ubi sup.*; as to teazles, *Kingsbury* v. *Collins*, 4 Bing. 202; 5 L. J. C. P. 151; nor to growing crops and grass (even though sown from seed, and ready to be cut for hay); nor to timber or fruit trees, fruit on trees, shrubs or plants, *Empson* v. *Soden*, 4 B. & Ad. 655; except in the case of a gardener or nurseryman by trade, *Penton* v. *Robart*, 2 Ea. 90; *Wyndham* v. *Way*, 4 Tau. 316; nor generally to anything which is not planted or produced annually at the expense and by the labour of the occupier. See also 1 Wms. Exors. 536 *et seq.*; Amos & Ferard, Fixtures, 265.

Bequest of farming stock.

A bequest of farming stock will, in general, carry growing crops, *West* v. *Moore*, 8 Ea. 339; *Cox* v. *Godsalve*, 6 Ea. 604, n.; *Re Roose*, 17 Ch. D. 696; 50 L. J. Ch. 197. See also *Rudge* v. *Winnall*, 12 Be. 357; 18 L. J. Ch. 469, where there being a devise to A., and a bequest of all live and dead stock and all personal estate to B., it was held that the emblements on the real estate passed to B. Of course, if the testator is not the owner of the land on which the crops are growing, the question as to emblements being included in a bequest of farming stock can arise only between the legatee of the farming stock on the one hand, and the residuary legatee or executor on the other hand: in such a case it seems that the legatee of the farming stock is entitled to the emblements. The severance of the emblements from the land is a necessary consequence of the non-ownership of the farm by the testator.

(*e*) It is only necessary to state that there shall be a trust for sale if real estate was comprised in the property originally settled by the will. See sect. 23 of the Law of Property Act, 1925 (15 Geo. 5, c. 20). Unless there is an imperative trust for sale, a mere declaration will not cause conversion, *Re Walker*, [1908] 2 Ch. 705, 712; 77 L. J. Ch. 755; *Re Aspinall's Settled Estates*, [1916] 1 Ch. 15; 85 L. J. Ch. 102; *Re Twopenny's Settlement*, [1924] 1 Ch. 522; 93 L. J. Ch. 323.

(*f*) See note (*b*) to Prec. 4.

(*g*) See note (*f*) to Prec. 7.

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No. XXVII.

WILL *of a* LANDED PROPRIETOR *devising his Real Estate in settlement.—Bequest of Residuary Personal Estate to be applied, after providing portions, in purchase of land to be settled.*

THIS IS THE LAST WILL of me [*testator's name residence and quality.*]

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

Appointment of executors, trustees and guardians.

2. I APPOINT [*names &c.*] to be executors and trustees of this my will and trustees thereof for the purposes of the Settled Land Act 1925 and I APPOINT them to be guardians of my infant children (*a*).

Devise to trustees. Rent-charge for wife. For testator's lineal and collateral relations in strict settlement.

3. I DEVISE all my real estate to my trustees hereinbefore named upon the following trusts namely upon trust that my wife may receive out of the rents thereof during her life a yearly rent-charge of £—— payable quarterly (*b*) AND subject thereto upon trust for my sons and daughters and my brothers and sisters and their respective issue in the order for the interests and in manner following (namely) first for my sons and their issue secondly for my daughters and their issue thirdly for my brothers and their issue and lastly for my sisters and their issue (*c*) every elder son daughter brother and sister and his or her issue to be preferred to every younger and his or her issue and so that every son and daughter of mine and every brother and sister of mine born in my lifetime shall be tenant for life and as to my freehold estates without impeachment of waste With remainder upon trust for his or her first and other sons successively by seniority in tail male with remainder upon trust for his or her daughters successively by seniority in tail male with remainder upon trust for his or her sons successively by seniority in tail with remainder upon trust for his or her daughters successively by seniority in tail and every brother and sister of mine born after my death to be tenant in tail male with remainder upon trust for himself or herself in tail But so that the estate of every female tenant for life shall be without power of alienation or anticipation And on failure or determination of the trusts aforesaid upon trust for sale and to pay or distribute the net proceeds of sale to or amongst the person or persons who at the time of such failure or determination would be entitled to my residuary estate under the Administration of Estates Act 1925 if at such time I were to die intestate and for such interests and shares as are provided by that Act.

Chattels real.

4. I BEQUEATH all my chattels real to the trustees hereinbefore named Upon trust that my trustees shall permit the same to be enjoyed according to the aforesaid trusts affecting my real estate but not so as to duplicate or increase the yearly rentcharge payable to my said wife.

Residue of personalty.

5. I BEQUEATH all the residue of my personal estate to the trustees hereinbefore named Upon trust that my trustees shall convert the same into money and thereout pay my funeral and testamentary expenses and debts And in the next place set apart a sum of £—— for the portion of each child of mine

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(other than an eldest or other child of mine who shall become indefeasibly entitled in possession to my real estate under the limitations hereinbefore contained) who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married under that age And hold the residue of my personal estate and the moneys representing the same In trust to invest the same in the purchase of freehold land to be settled upon the trusts hereinbefore declared concerning my real estate (*d*).

6. *Trustee interpretation clause as in Prec.* 3, *clause* 6.

IN WITNESS &c.

NOTES to Precedent 27.

(*a*) See note (*a*) to Prec. 5, and note (*f*) to Prec. 12.

(*b*) See sect. 121 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), giving the annuitant powers of distress and entry.

(*c*) By virtue of sect. 130 of the Law of Property Act, 1925 (15 Geo. 5, c. 20) an entailed interest may be created by way of trust, but only by the like expressions as those by which before 1926 a similar estate tail could have been created by deed. The word "issue" would not create an estate tail in a deed, and the interests given in this clause depend upon the words explanatory of the testator's intention. See note (*c*) to Prec. 28.

(*d*) See sects. 73 and 83 of the Settled Land Act, 1925 (15 Geo. 5, c. 18); and *Re Walker*, [1908] 2 Ch. 705; 77 L. J. Ch. 755.

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No. XXVIII.

WILL *of a large* LANDED PROPRIETOR.—*Appointment of Executors and Guardians.—Charge of Annuities.—Additional Jointure Rent-charge for Wife.—Term for raising Money in aid of Personal Estate to pay Debts and Legacies.—Term for raising Portions for Testator's younger Children.—Limitations in strict Settlement for the Testator's Issue, with Remainders for his collateral Relations.—Powers to Tenants for Life to charge with Jointures; to limit Life Estates to Husbands; to charge with Portions for younger Children.—Appointment of Trustees for purposes of Settled Land Act,* 1925.—*Clause enjoining the Use of Testator's Name and Arms.—Leasehold Estates upon corresponding Trusts.—Plate, &c., to be enjoyed as Heirlooms.—Bequest of Carriages, &c., to Wife.—Direction to keep up Testator's Establishment for a short Period.—Bequest of the Residue of Personal Estate to Trustees for Investment*

in Land, to be settled upon Trusts of the devised Estate.—One of the Trustees, a Solicitor, to be entitled to professional Charges. PREC. 28.

THIS IS THE LAST WILL of me [*testator's name residence and quality.*]

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT [*names &c.*] to be executors of this my will and guardians of my children during their respective minorities. Appointment of executors and guardians.

3. I GIVE to the several persons next hereinafter named for their respective lives yearly sums of the respective amounts next hereinafter specified that is to say To [*annuitant's name &c.*] £—— To —— &c. which yearly sums shall issue as rent-charges out of all my freehold lands in the parish of —— and be payable half-yearly on Midsummer Day and Christmas Day the first payment to be made [*or* a proportionate part for so much of the current half-year as shall be unexpired at my death to be paid] on such of the same days as shall happen next after my death. Gift of life annuities, charged on particular lands.

4. I DISPOSE of all the freehold hereditaments of which I am or may at my death be competent to dispose including my reversion in fee in the freehold estate at —— comprised in my marriage settlement but as to my said lands at —— aforesaid hereinbefore charged with the payment of the said annuities subject to such charge in manner following namely As to my hereditaments at —— at the date of this my will let to [*name of tenant*] at the yearly rent of £—— To [*first set of trustees*] for the term of five hundred years to be computed from my death without impeachment of waste upon the trusts hereinafter expressed And as to the same hereditaments subject to such term and as to all other the hereditaments aforesaid To the intent that my wife [*name*] may receive out of the rents during her life (*a*) a yearly rent-charge of £—— in addition to the jointure provided for her by my said marriage settlement by equal quarterly payments at Lady-day Midsummer Michaelmas and Christmas but without any proportional part thereof down to her death the first quarterly portion to be payable on such of the same days as shall first happen after my death (*b*) And subject to the same rent-charge To [*second set of trustees*] for the term of one thousand years to be computed from my death without impeachment of waste upon the trusts hereinafter expressed AND subject to such term I DEVISE all the hereditaments aforesaid [*third set of trustees*] upon trust for every son of mine and his issue male in succession (*c*) so that every elder Devise of freehold estates; —as to part to trustees for 500 years; —as to all the estates; to testator's wife a rent-charge for life, in addition to her jointure. To trustees for 1,000 years; —to trustees for testator's sons for life, remainder for their first and

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other sons in tail male;

—for testator's daughters for life, remainder for their first and other sons in tail male;

—for first and other daughters of testator's sons and daughters in tail male;

—for first and other sons and daughters of testator's sons and daughters in tail;

—for testator's brothers born in his lifetime, for life, with like remainders for their issue;

for testator's brothers born after his death, in tail male and tail;

for testator's sisters and their issue in like manner;

[*Or*—for a brother, for life; remainder for his children born in testator's lifetime, for life; remainder for their issue;

son and his issue male may be preferred to every younger son and his issue male and so that every such son may take an estate for his life with remainder upon trust for his first and every subsequent son successively according to seniority in tail male And on failure of such issue upon trust for every daughter of mine and her issue male in succession so that every elder daughter and her issue male may be preferred to every younger daughter and her issue male and so that every such daughter may take an estate for her life without power of anticipation with remainder upon trust for her first and every subsequent son successively according to seniority in tail male And on failure of such issue upon trust for the first and every subsequent daughter successively in tail male of every son and daughter of mine in the order in which my said hereditaments are hereinbefore limited in trust for the sons of every son and daughter of mine And on failure of such issue upon trust for the first and every subsequent son and the first and every subsequent daughter successively in tail of every son and daughter of mine in the order in which my said hereditaments are hereinbefore limited in trust in tail male for the sons and daughters of every son and daughter of mine And on failure of such issue upon trust for every brother of mine born in my lifetime and his issue for the same interests and in the same order as my said hereditaments are hereinbefore limited in trust for every son of mine and his issue And on failure of such issue upon trust for every brother of mine born after my death and his issue for the same interests and in the same order as my said hereditaments are hereinbefore limited in trust for the first and every subsequent son of every son of mine And on failure of such issue upon trust for every sister of mine born in my lifetime and her issue for the same interests and in the same order and subject to the same limitations as my said hereditaments are hereinbefore limited in trust for every daughter of mine and her issue And on failure of such issue upon trust for every sister of mine born after my death and her issue for the same interests and in the same order as my said hereditaments are hereinbefore limited in trust for the first and every subsequent daughter of every son of mine [*or* For my brother [*name*] for his life and after his death for every son and daughter born in my lifetime of my said brother and the issue of such son and daughter for the same interests and in the same order and as to daughters subject to the same limitations as my said hereditaments are hereinbefore limited in trust for every son and daughter of mine and his or her issue And on failure of such issue upon trust for every son and daughter born after my death of my said brother

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and the issue of such son and daughter for the same interests and in the same order as my said hereditaments are hereinbefore limited in trust for the first and every subsequent son and the first and every subsequent daughter of every son and daughter of mine And on failure of such issue upon trust for my brother [*name*] and his issue for the same interests and in the same order as my said hereditaments are hereinbefore limited in trust for my said brother [*name*] and his issue And on failure of such issue upon trust for my sister [*name*] the wife of [*name &c.*] and her issue for the same interests and in the same order and subject to the same limitations as my said hereditaments are hereinbefore limited in trust for every daughter of mine and her issue And on failure of such issue upon trust for my sister [*name*] and her issue for the same interests and in the same order and subject to the same limitations as my said hereditaments are hereinbefore limited in trust for my said sister [*name*] and her issue] And on failure or determination of the trusts aforesaid upon trust for sale and to pay or distribute the net proceeds of such sale to or amongst the person or persons who at the time of such failure or determination would be entitled to my residuary estate under the Administration of Estates Act 1925 if at such time I were to die intestate and for such interests and shares as are provided by that Act AND I DECLARE every estate for life hereinbefore given to be unimpeachable for waste.

—for children of brother born after testator's death, in tail male, and in tail;

—for another brother and his issue, in like manner;

—for a sister and her issue, in like manner;

—for another sister and her issue, in like manner.]

5. I DECLARE that the said term of five hundred years hereinbefore limited to the said [*first set of trustees*] is so limited UPON TRUST in case my personal estate not hereinafter bequeathed to my wife shall be insufficient to satisfy my debts funeral and testamentary expenses and the pecuniary legacies hereinafter bequeathed then out of the rents and profits of the hereditaments comprised in the same term or by mortgage or sale of the same premises or any part thereof or by any other means to raise in aid of my personal estate not so bequeathed so much money as shall be sufficient to satisfy the same debts expenses and legacies and to pay such money to my executors or administrator who shall apply the same accordingly and whose receipt shall exonerate the trustees or trustee of the said term of five hundred years from all liability in respect of the application thereof.

Trusts of 500 years term, for raising money in aid of personal estate, to pay debts and legacies.

6. I DECLARE that the said term of one thousand years hereinbefore limited to the said [*second set of trustees*] is so limited to them UPON TRUST in case any child or children of mine other than an eldest or other child becoming indefeasibly entitled to the said hereditaments under the trusts herein-

Trusts of 1,000 years term, for raising portions for younger children.

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before contained shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married then to raise for the portion or portions of such child or children if only one the sum of £—— or if two and no more the sum of £—— to be divided equally between them or if three or more the sum of £—— to be divided equally amongst them in addition to the provision made for the said children by my said marriage settlement the portion of a son to be raiseable when and as he shall attain the said age and the portion of a daughter to be raiseable when and as she shall attain that age or be married with interest after the rate of five per cent. per annum on the said portion or portions from the period or respective periods at which the same ought to be raised until the same shall be actually raised and paid.

Power to male tenants for life to limit jointures to wives.

7. I EMPOWER every male tenant for life under the trusts herein contained whether entitled in possession or not and either in contemplation of or after marriage by deed revocable or irrevocable or by his will to appoint but without prejudice to any prior subsisting limitations or powers to or in favour of any woman whom he shall marry or have married a yearly rent-charge or rent-charges not exceeding in the whole the sum of £—— to be issuing out of my said hereditaments or any part thereof and to begin from the death of such tenant for life and to be payable half-yearly during the life of such woman for her jointure But no rent-charge to be appointed under this power shall take effect as an actual charge unless the appointor shall be or afterwards become entitled in possession to the said hereditaments or would if living have been so entitled under the trusts herein contained And if the said hereditaments would under this power be liable at any one time to the payment of a larger yearly sum in the whole than £—— then the posterior charge or charges shall not take effect or shall only partially take effect in possession until the amount of the previous charge shall cease or be diminished so as always to limit the existing annual charge to the sum lastly specified.

Power to female tenants for life to limit life estates or rent-charges to husbands.

8. I EMPOWER every female tenant for life under the trusts herein contained whether entitled in possession or not either in contemplation of or after marriage by deed revocable or irrevocable or by her will to appoint but without prejudice to any prior subsisting limitations or powers to or in favour of any husband to whom she shall be or have been married (*d*) my said hereditaments or any part thereof for his life or any yearly rent-charge to be issuing out of my said hereditaments or any part thereof and to be payable during his life such appointed estate or yearly rent-charge to begin from the death of the

appointor But no estate or yearly rent-charge to be appointed under this power shall take effect as an actual estate or charge unless the appointor shall be or afterwards become entitled in possession to the said hereditaments or would if living have been so entitled under the trusts herein contained.

Power to tenants for life to charge with portions for younger children.

9. I EMPOWER every tenant for life under the trusts herein contained whether entitled in possession or not by deed revocable or irrevocable or by will to appoint but without prejudice to any jointure rent-charge or life estate to be limited to the wife or husband of such tenant for life under any power hereinbefore contained my said hereditaments or any part thereof to any trustee or trustees for any term of years without impeachment of waste upon proper trusts and with proper powers and provisions for raising for the child or children of the tenant for life so appointing other than an eldest or other (*e*) child becoming indefeasibly entitled to the said hereditaments under the trusts aforesaid a portion not exceeding £—— for one child or portions not exceeding in the whole £—— for two children or £—— for three or more children (*f*) with maintenance not exceeding interest at the rate of five per cent. per annum on such portion or portions But the trusts of the term to be created as last aforesaid shall not be capable of being executed unless the appointor or some of his or her issue shall be or shall afterwards become entitled in possession to the said hereditaments under the trusts aforesaid And if the said hereditaments would by reason of the exercise of this power be liable at any one time to the payment of a larger principal sum in the whole than £—— including the portion or portions raiseable under the trusts of the said term of one thousand years then the charge or charges posterior in point of title shall be wholly or partially suspended.

Appointment of trustees for purposes of Settled Land Act.

10. I APPOINT [*third set of trustees*] to be trustees of the settlement made by this my will for the purposes of the Settled Land Act 1925 (*g*).

Proviso requiring persons entitled under the limitations to take the testator's name and arms.

11. I DECLARE that every person having a surname or arms different from the surname or arms hereinafter required to be used who shall be entitled in possession as beneficial tenant for life or tenant in tail by purchase under the trusts herein contained and not be a married woman or who shall marry any female becoming so entitled shall as to every such tenant within eighteen calendar months after he or she shall become entitled in possession if of the age of twenty-one years or if not within eighteen calendar months after attaining that age and as to every such husband within eighteen calendar months after his wife shall become entitled in possession or be married to him

PREC. 28.

whichever shall last happen assume and use under the sanction of an Act of Parliament or licence from the Crown or by deed enrolled in the Central Office of the Supreme Court or otherwise my surname of —— either alone or in addition to his or her usual surname (but so that the name of —— shall be the last and principal name) and also assume and use the arms of —— either alone or charged upon impaled quartered or marshalled with his or her family arms and shall thenceforth use the same surname and arms accordingly and that every person excluded by reason of his or her already bearing the surname and arms aforesaid from the operation of the requisitions aforesaid shall continue the use of such surname and arms And that in case of neglect or refusal (*h*) to comply with all or any of the requisitions of this proviso the estate or estates hereby settled in trust for the life of the person or as the case may be the estate tail hereby settled in trust for the person who or whose husband shall be guilty of such neglect or refusal shall cease as though such person neglecting or refusing were dead and the subsequent trusts be accelerated accordingly AND I DECLARE that on the cesser of the estate of a female tenant for life whose husband shall so neglect or refuse as aforesaid any appointment or appointments of a life estate or rent-charge made or to be made by her in his favour in exercise of the power hereinbefore given to her shall be void.

Leasehold estates for lives and years to be enjoyed according to the limitations of the freeholds.

12. I DIRECT that the leasehold tenements to which I may be entitled at my death whether held for lives or for years absolute or determinable shall be enjoyed or held with and upon trusts corresponding to the trusts hereinbefore declared in regard to my freehold estates hereinbefore devised posterior to the limitation of the said term of five hundred years (*i*).

Rents not to be apportioned.

13. I DECLARE that the rents of my real and leasehold estates and tenements current or accruing at the time of my death shall not be apportioned (*k*).

Plate, pictures, &c., to be enjoyed as heirlooms, and an inventory taken.

14. I DIRECT that the library of books with the book cases and appendages the pictures and framed prints and the statues marbles bronzes and other articles of *vertu* which shall be in or about or belonging to my mansion-house of —— at my death and all my plate and jewels there and elsewhere shall be held with the same mansion-house as heirlooms to be enjoyed by the person or persons for the time being beneficially entitled to the same mansion-house under the trusts hereinbefore contained AND I DIRECT that my executors shall within one calendar month after my death cause an inventory to be made of the said heirlooms and place a copy of such inventory signed by them and by the person then entitled to the enjoyment of the

said heirlooms among the muniments of title to my said mansion-house to be kept therein and shall deliver another copy so signed to the said [*third set of trustees*] to be kept by them And I DECLARE that it shall be lawful for the person or persons for the time being beneficially entitled to the same mansion-house as aforesaid to exchange for others or absolutely to sell and dispose of all or any of the said heirlooms (*l*) with the consent of the trustees of the settlement created by this my will and without any order of Court and to employ the moneys to arise from any such sale or sales in the purchase (with the like consent) of any new or other article or articles of a similar nature and description to be subject together with those taken in exchange to the same directions as are herein expressed concerning the said heirlooms.

Power to sell and exchange heirlooms.

15. I DECLARE that my wife shall be at liberty to reside in my mansion-house of —— for six calendar months after my death and that whether she shall reside therein or not my executors shall keep up my establishment there for that period upon the same scale and in the same mode as it had been usually maintained in my lifetime and defray the housekeeping expenses servants' wages taxes and all other incidental outgoings out of my personal estate.

Permission to wife to reside in mansion-house for six months; executors to keep up the establishment.

16. I BEQUEATH my carriages carriage and saddle horses with the harness and accoutrements belonging thereto wines liquors fuel housekeeping stores and provisions household furniture linen china brewing utensils and other household effects (*m*) belonging to me at my death except the articles hereinbefore constituted heirlooms to my wife absolutely but subject to be used and consumed by my executors in keeping up my establishment as aforesaid.

Bequest to wife of carriages, &c.

17. I BEQUEATH the residue of the personal estate to which I may be entitled at my death unto the said [*third set of trustees*] UPON TRUST to convert collect and get in the same and as to the moneys to arise therefrom UPON TRUST to lay out the same in the purchase of freehold hereditaments in fee simple in possession (*n*) situate in England or Wales or of leasehold tenements such leasehold tenements to be held under a renewable lease or leases for lives or for years or for a term of years absolutely whereof at least fifty years shall be unexpired convenient to be held with the hereditaments hereinbefore limited in strict settlement and UPON TRUST to settle or cause to be settled the hereditaments and tenements so to be purchased to and upon such of the trusts and subject to such of the provisions hereinbefore limited or expressed concerning my freehold hereditaments hereinbefore devised as shall be sub-

Residue of personal estate to be invested on freehold or leasehold property to be held on same trusts as estates hereinbefore devised.

PREC. 28.

Power to postpone the conversion of personalty.

sisting and I AUTHORISE the trustees or trustee for the time being of such residue to permit the same or any part thereof to remain outstanding upon securities or otherwise for such period as they or he shall think fit and I DECLARE that the yearly produce of my residuary personal estate for the time being outstanding whether such produce be more or less than such estate if invested pursuant to the trust aforesaid would have yielded shall be deemed the income thereof and be applied as such conformably to the destination of the rents of the estates directed to be purchased as aforesaid.

Power for trustees to complete a contract without requiring a marketable title;

—if contract be abandoned, the money to be laid out in another purchase.

18. I DECLARE that if the contract which I have entered into dated the —— day of —— instant for the purchase of a freehold estate in the parish of —— in the county of —— shall not be completed in my lifetime the said [*third set of trustees*] shall have power to carry the same into effect if they or he shall deem it expedient to do so although the title to the said estate shall not be strictly marketable [AND in case the said contract shall be vacated on account of a defect of title or otherwise then I DIRECT my same trustees to invest a sum of money equal to the amount of the purchase-money in the purchase of freehold lands to be settled upon the trusts by this my will declared concerning my real estate and until such purchase shall be made the said moneys or such part thereof as shall not be so laid out shall be invested by my same trustees in Government or real securities (but not in any other kind of security) and the dividends or interest of such investment shall be paid to the persons who would be entitled to the rents and profits of the land to be so purchased] (*o*).

Direction that one of the trustees and executors shall act and charge as solicitor to the estate.

19. I DECLARE that the said —— shall notwithstanding his acceptance of the office of trustee and executor of my will and his acting in the execution thereof be entitled to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him and all attendances time and trouble given or bestowed by him in or about the execution of the trusts and powers of my will or the management and administration of my trust estate real or personal as if he not being himself a trustee or executor of my will were employed by the trustees and executors thereof as their solicitor and he shall be entitled to retain out of my trust moneys or to be allowed and to receive from his co-trustees (if any) out of the same moneys the full amount of such charges any rule of equity to the contrary notwithstanding (*p*) nevertheless without prejudice to the right or competency of the

said [*name*] to exercise the authority control, judgment and discretion of a trustee of my will. PREC. 28.

IN WITNESS &c.

NOTES to Precedent 28.

(*a*) The only rentcharge which, after 1925, can subsist at law is a rentcharge either perpetual or for a term of years absolute. It can otherwise only take effect as an equitable interest. Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 1.

(*b*) The remedies by distress, entry, &c., for recovery of a rentcharge are now supplied by sects. 121 and 122 of the Law of Property Act, 1925 (15 Geo. 5, c. 20). As to the rights of personal representatives to distrain for arrears of a rentcharge, see sect. 26 (3) of the Administration of Estates Act, 1925 (15 Geo. 5, c. 23).

(*c*) As to this clause, see *Re Lawrence* (*Lord*), [1915] 1 Ch. 129; 84 L. J. Ch. 273, distinguishing *Re Simcoe*, [1913] 1 Ch. 552; 82 L. J. Ch. 270. And see *Re Hobbs*, [1917] 1 Ch. 569; 85 L. J. Ch. 409; *Re Elton*, [1917] 2 Ch. 413, and note (*c*) to Prec. 27.

(*d*) See note (*c*) to Prec. 17.

(*e*) See *Tuite* v. *Bermingham*, L. R. 7 H. L. 634.

(*f*) A power to trustees to raise by mortgage a specific sum for portions implies power to raise the costs of the mortgage, *Armstrong* v. *Armstrong*, L. R. 18 Eq. 541; 43 L. J. Ch. 719; *Nightingale* v. *Reynolds*, [1902] 2 Ch. 117, 131, affirmed [1903] 2 Ch. 236; 72 L. J. Ch. 564.

(*g*) As to management of land during minority, see the Settled Land Act, 1925, s. 102; Trustee Act, 1925, s. 31. Unless a sole trustee is a trust corporation, there must be at least two trustees to receive capital money, Settled Land Act, 1925, s. 94. As to raising money for repairs by means of a mortgage, see *Re Jackson*, 21 Ch. D. 786. And see note (*a*) to Prec. 5. S. L. A. 1925, s. 102.

(*h*) The points chiefly to be attended to in framing clauses of this nature are: *First*, to describe with explicitness and precision the act or event contemplated by the testator. For instance (by way of selecting a few examples of frequent occurrence), where a name is to be assumed, it should be shown whether the authority of the royal licence or an Act of Parliament is to be obtained, or whether a deed is to be enrolled, otherwise the clause will be satisfied by an assumption of the name without any such proceeding, Co. Litt. 3 a; Jarm. Wills, ch. 39, xi. Suggestions as to framing clauses enjoining the use of a name and arms, &c.

See *Musgrave* v. *Brooke*, 26 Ch. D. 792, as to a name and arms clause intended to defeat a devise in fee simple being void for repugnancy. Where a testator prescribes the mode by which the name is to be assumed, of course no other mode may be substituted for it; but a royal licence or an Act of Parliament is not necessary for adopting a new surname; a voluntary assumption, if made for no fraudulent purpose, is sufficient, *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 430; 38 L. J. P. C. 35; and in the absence of any express stipulation or requirement by the testator, it is apprehended that a person voluntarily assuming the name within a reasonable time satisfies the condition imposed on him, and that the words "bearing the surname" are satisfied by a *de facto* bearing of that name. As to whether the assumed surname may precede the original name, see *D'Eyncourt* v. *Gregory*, 1 Ch. D. 441; 45 L. J. Ch. 205; and *Re Eversley*, [1900] 1 Ch. 96; 69 L. J. Ch. 14; see also, on clauses of this kind, Peachey on Settlements, Name and arms clauses.

NOTES TO PREC. 28.

964; Vaizey on Settlements, 1262, *et seq.*; as to a woman's surname acquired by marriage, *Fendall* v. *Goldsmid*, 2 P. D. 263; 46 L. J. P. 70; *Cowley* v. *Cowley*, [1901] A. C. 450; 70 L. J. P. 83; and as to the custody of a deed of grant of arms from the Heralds' College, see *Stubs* v. *Stubs*, 1 H. & C. 257; 31 L. J. Ex. 510. If a will requires that a person shall assume a certain surname within a specified time, a continued use of the surname after the period is to be implied, *Re Drax*, 75 L. J. Ch. 317.

Arms.

Clauses enjoining the use of particular arms are often ineptly worded. Sometimes a technical knowledge of heraldry is requisite. 'Quartering' in heraldry is usually the result of 'marshalling' the arms of allied families. A husband 'impales' his wife's arms, unless she is an 'heir,' *i.e.* in heraldry, the member of a family extinct as to males, when, after the death of her father and the birth of issue to himself, a husband bears his wife's arms on an Escutcheon of Pretence; the children in the latter case bear, after the death of their mother, the arms of both parents 'quartered,' and the quartered arms descend. See the principle of marshalling explained in Clark's Introduction to Heraldry (18th ed.), by J. R. Planché—Marshalling—where it is shown how a man marshalls his own with the coats of as many as seven wives; English Heraldry, by Charles Boutell (5th ed.), p. 175 *et seq.*; A Complete Guide to Heraldry, by A. C. Fox-Davies, ch. xxxiii—The Marshalling of Arms. And see as to "taking, using and bearing" arms, *Austen* v. *Collins*, 54 L. T. 903; and as to what is meant by "lawfully assume," *Re Croxon*, [1904] 1 Ch. 252; 73 L. J. Ch. 170. It may be remarked that, although conditions as to the assumption of a particular surname involve little difficulty, conditions as to the assumption and continuous use of particular arms are extremely dangerous, inasmuch as compliance with them can seldom be proved and they may often be broken inadvertently. Without a gift over, the words as to name and arms may merely be the expression of a desire, *Re Evans's Contract*, [1920] 2 Ch. 469; 89 L. J. Ch. 626. See for proceedings to prevent the unlawful assumption of arms, *Sir Henry Blount's Case*, 1 Atk. 295 (England); *Mackenzie* v. *Frazer-Mackenzie*, 38 T. L. R. 170 (Scotland).

Clause enjoining residence.

Secondly. If a clause enjoins residence, it ought to appear what length of continuous or occasional occupation is to be deemed sufficient. As to what will constitute residence, see *Fillingham* v. *Bromley*, T. & R. 536; *Dunne* v. *Dunne*, 7 D. M. & G. 207; *Walcot* v. *Botfield*, Kay, 534; *Wynne* v. *Fletcher*, 24 Be. 430; *Re Moir*, 25 Ch. D. 605; 53 L. J. Ch. 474; *Re Wright*, [1907] 1 Ch. 231; 76 L. J. Ch. 89; *Re Adair*, [1909] 1 Ir. R. 311; *Re Vivian*, 36 T. L. R. 657. Notwithstanding sect. 51 of the Settled Land Act, 1882, such clauses have been valid, *Re Haynes*, 37 Ch. D. 306; 57 L. J. Ch. 519; and see now sect. 106 of the Settled Land Act, 1925; but they are void as regards preventing the tenant for life from exercising the statutory powers of a tenant for life, and after sale he will still be tenant for life of the proceeds of sale, although residence has become impossible, *Re Paget's Settled Estates*, 30 Ch. D. 161; 55 L. J. Ch. 42. See also *Re Trenchard*, [1902] 1 Ch. 378; 71 L. J. Ch. 178; *Re Richardson*, [1904] 2 Ch. 777; 73 L. J. Ch. 783; *Re Simpson*, [1913] 1 Ch. 277; 82 L. J. Ch. 169; *Re Gibbons*, [1920] 1 Ch. 372; 89 L. J. Ch. 148; *Re Boulter*, [1922] 1 Ch. 75; 91 L. J. Ch. 250. If the object is to confine the appropriation of the property to the personal enjoyment of the devisee, the clause should be expressly extended to alienations by operation of law.

NOTES TO PREC. 28.

Thirdly. In cases where the act or event is of a recurring nature, and with reference to a series of limitations, and it is the intention of the framer of the instrument to subject the estate of every person taking under the limitations to the performance of the act or the happening of the event, such intention should be made clear by express provision, lest it should be contended that, by the act having been once performed or the event having once happened, the persons taking under the later limitations are exempt from the consequences incident to the recurrence of the event or to the non-performance by them of the act. In the *Earl of Scarborough's Case* it was contended (though unsuccessfully) that the descent of the earldom and the shifting of the estate having once happened, the use for again shifting the estate on a second descent was nugatory, its power having been exhausted by one operation; much use was made of an argument derived from the different modes in which the clause imposing the necessity of taking the name and arms of the Savile family, and the clause shifting the estate on the descent of the earldom, were framed; the former having been framed so as clearly to enjoin the necessity of complying with the clause *toties quoties*, the latter expressing that necessity with less clearness, *Earl of Scarborough* v. *Savile*, 3 A. & E. 897. In *Re Robinson*, [1892] 1 Ch. 95; 61 L. J. Ch. 17; [1897] 1 Ch. 85; 66 L. J. Ch. 97, where the condition was a continuing one, and the fund, the subject of the bequest, being in Court, it was held that it must be retained in Court, and the income paid out to the legatee if he should comply with the condition.

Conditions of a recurring nature.

Fourthly. It should be shown distinctly whether the prescribed act or event is to be in the nature of a condition precedent or a condition subsequent; in other words, whether the performance or happening is to precede the vesting, or the non-performance or non-happening is to divest an interest antecedently vested; whether, in fact, the condition is imposed on the acquisition of the property, or only on its retention. See instances of condition precedent and subsequent collected in Jarm. Wills, ch. 39 (iii.).

Conditions precedent or subsequent.

Fifthly. It should be stated whether the whole duration of life, or any and what less period, is to be allowed for performance, *Re Hartley*, 34 Ch. D. 742; 56 L. J. Ch. 564; and whether any and what notice is to be given to the devisee. The rule as to notice is, that, where the devisee on whom the condition is imposed is the testator's heir, the devisee over is bound to apprise him of the condition, but not otherwise, *Doe* v. *Beauclerk*, 11 Ea. 657, 662.

Time allowed for performance of condition.

Sixthly. The clause should point out the precise destination of the property in the event of non-compliance, showing clearly, if there are remainders limited to the issue of the offending party, whether they are or are not to be involved in the forfeiture.

Destination of property, if no compliance.

Seventhly. If the clause is of a nature to require the concurrence of a third person, as, for instance, marrying with consent, &c., or living in the service of another, &c., then it ought to be shown what is to be the result of compliance becoming impracticable by the death or lunacy of such third person. See *ante*, p. 315.

Compliance impossible.

Ignorance of a condition annexed either to a devise, *Astley* v. *Earl of Essex*, L. R. 18 Eq. 290; 43 L. J. Ch. 817; or bequest, *Re Hodge's Legacy*, L. R. 16 Eq. 92; 42 L. J. Ch. 452; *Powell* v. *Rawle*, L. R. 18 Eq. 243, does not protect the devisee or legatee from the consequence of non-compliance.

Ignorance of condition.

As to infancy excusing a devisee from compliance with a condition

Infancy.

NOTES TO PREC. 28.

requiring residence, see *Partridge* v. *Partridge*, [1894] 1 Ch. 351; 63 L. J. Ch. 122. And as to an infant's incapacity to satisfy a condition involving choice of a religion, see *Re May*, [1917] 2 Ch. 126; 86 L. J. Ch. 698.

Conditions.

No precise form of expression is required to attach conditions to the enjoyment of gifts conferred by will: any words which show the intention of the testator are sufficient for the purpose. But the intention must be clear, otherwise the condition will be void for uncertainty, *Jeffreys* v. *Jeffreys*, 84 L. T. 417; *Re Sandbrook*, [1912] 2 Ch. 471; 81 L. J. Ch. 800.

And it must not be contrary to public policy. Thus, a condition subsequent in a will divesting property in the event of the beneficiary entering the naval or military service of the country is against the welfare of the community and absolutely void, *Re Beard*, [1908] 1 Ch. 383; 77 L. J. Ch. 265; *Re Sandbrook, ubi sup.* And see *Re Lovell*, [1920] 1 Ch. 122; 88 L. J. Ch. 540; and *Re Wallace*, [1920] 2 Ch. 274; 89 L. J. Ch. 450.

Impossibility of condition attached to realty,

As regards real estate, when a condition precedent cannot be fulfilled, owing to its actual impossibility or its illegality, the estate fails; but if a condition subsequent becomes impossible or is illegal, the estate is absolute. See *Re Emson*, 74 L. J. Ch. 565. But see Jarm. Wills, ch. 39 (vi.), as to the case where there is a gift over on non-performance of the condition. In *Re Kirk*, 21 Ch. D. 431, there was a devise on condition that the devisee should relinquish a debt due to him by the testator, and the devisee died before the testator: it was held that the condition bound the land, notwithstanding the lapse, and that the debt must be discharged out of it.

—and personalty.

As regards personal estate, no distinction is recognised between a precedent and subsequent condition. Where a condition attached to a legacy is impossible, the general rule is that the gift vests absolutely and unconditionally; subject, however, to exceptions in the cases, (1) where the fulfilment of the condition is the sole motive of the gift, (2) where the impossibility was not known to the testator when he imposed the condition, and (3) where the condition, originally possible, has become impossible by the act of God. If the condition is void by reason of its involving a *malum prohibitum*, the bequest is absolute; but if the condition involves a *malum in se*, the gift itself is void. In *Wilkinson* v. *Wilkinson*, L. R. 12 Eq. 604; 40 L. J. Ch. 242, a condition which would have required the legatee to omit doing something that was a duty was held void; and in *Yates* v. *University College, London*, 7 H. L. 438; 45 L. J. Ch. 137, where a condition became impossible by the act of the testator, it was held that the bequest took effect absolutely.

Contingent gift subject to condition.

That a contingent gift has a real existence, and is capable of being operated upon by a condition subsequent, and of being made to cease and become void, see *Egerton* v. *Brownlow*, 4 H. L. C. 1; 23 L. J. Ch. 348; *Re Wallace*, [1920] 2 Ch. 274; 89 L. J. Ch. 450.

Repugnant conditions.

Conditions or restraints inconsistent with and repugnant to estates or interests to which they are annexed are absolutely void. Thus, if there is a devise in fee, a condition that the devisee shall not sell the estate is repugnant to the absolute devise, and therefore void, Co. Litt. sect. 360; but if the condition is that the devisee shall not alien to such an one, or to any of his heirs, or the like, which condition does not take away all power of alienation from the devisee, such condition is good, Co. Litt.

sect. 361. But any condition which will amount to an absolute restraint on alienation in such a case will be void. Thus if there is a devise in fee with a condition that the devisee desiring to sell in the lifetime of the testator's widow shall sell the estate to her at a fifth of its real value, this amounts to an absolute restraint on alienation during the widow's life, and is void, *Re Rosher*, 26 Ch. D. 801; 53 L. J. Ch. 722, where the cases were reviewed. In *Re Elliot*, [1896] 2 Ch. 353; 65 L. J. Ch. 753, a testator gave certain property to A. absolutely, subject to the payment of his debts, but the will contained a clause to the effect that if at any time A. should sell the property he was to pay certain legacies out of the proceeds of the sale. *Held*, that this clause was repugnant and void, and that A. took the property free from any claim by the legatees of the sums so attempted to be made payable. But a condition annexed to a devise that the property should go over if the devisee ceased to carry on business was held not repugnant in *Re Sax*, 62 L. J. Ch. 688. Where there is an absolute devise or bequest of real or personal property, followed by a gift over in the event of the donee dying intestate, the gift over is repugnant, and consequently void, *Barton* v. *Barton*, 3 K. & J. 512; *Holmes* v. *Godson*, 8 D. M. & G. 152; 25 L. J. Ch. 317; *Gulliver* v. *Vaux*, 8 D. M. & G. 167; see *Bradley* v. *Peixoto*, 3 Ves. 324, and the notes thereto in Tud. L. C. R. P.; also *Re Wilcock's Settlement*, 1 Ch. D. 229; 45 L. J. Ch. 163; *Shaw* v. *Ford*, 7 Ch. D. 669; 47 L. J. Ch. 531; *Re Parry and Daggs*, 31 Ch. D. 130; 55 L. J. Ch. 237; *Re Dugdale*, 38 Ch. D. 176; 57 L. J. Ch. 634; *Re Dixon*, [1903] 2 Ch. 458; 72 L. J. Ch. 642; *Re Ashton*, [1920] 2 Ch. 481; 89 L. J. Ch. 583. See *Re O'Hare*, [1918] 1 I. R. 160, where *Shaw* v. *Ford* was distinguished. Where the absolute interest in personal estate is given, there can be no further gift of it, *Hoare* v. *Byng*, 10 C. & F. 508. Thus a gift of £10,000 to A., and "afterwards, to go to" B., is an absolute gift to A., and the superadded words of gift to B. are rejected as void, *Re Percy*, 24 Ch. D. 616; 53 L. J. Ch. 143. But see *Re Sanford*, [1901] 1 Ch. 939; 70 L. J. Ch. 591. In *Brown* v. *Burdett*, 21 Ch. D. 667; 52 L. J. Ch. 52, where a testatrix devised a house to trustees, upon trust to block it up for twenty years, it was held that there was an intestacy as to the twenty years' term. *Re Johnston*, [1894] 3 Ch. 204; 63 L. J. Ch. 753, affords a good example of an unsuccessful attempt to impose a fetter upon absolute interests in personalty. In that case a testator directed that certain specified sums of money should be invested for the benefit of his four sons on their attaining twenty-one, such sums to be applied as the trustees in their discretion might think fit. *Held*, that the sons were absolutely entitled to the legacies, freed from the exercise of any discretion on the part of the trustees. See also the cases cited *ante*, pp. 145, 198.

Gift over, after absolute gift.

In various points of view it is important that conditions precedent and subsequent should be accurately distinguished. In regard to estates tail, the efficiency of the restriction depends entirely on the distinction; for if it is subsequent, the devisee may, at any time before the actual divesting of the estate, defeat the limitation over by an enrolled conveyance, which would have the effect of destroying all executory limitations ulterior to and engrafted on the estate tail, Jarm. Wills, 1491. An estate tail, therefore, to which a conditional limitation is intended to be annexed, ought, when possible, to be so framed that it shall not vest in the devisee until performance; and if it is meant that the devisee in tail shall have the enjoyment of the lands antecedently to the per-

As to conditions imposed on tenants in tail.

NOTES TO PREC. 28.

formance of the condition, a precedent estate for years should be carved out, determinable on performance or at the expiration of the period within which only performance can occur. See *Pelham-Clinton* v. *Duke of Newcastle*, [1903] A. C. 111; 72 L. J. Ch. 424.

Condition precedent requiring co-operation of others.

Where the condition which is to precede the vesting of an estate is of a nature to require for its performance the co-operation of a third person, the mere performance by the devisee of his part of the condition will not give effect to the devise, since a testator may, if he chooses, give one person an estate in case another does a certain act and not otherwise; and, if he has so intimated his intention, nothing less than a full compliance with the prescribed condition can entitle the devisee.

Where estate is devised over on non-performance.

It would seem that the doctrine applicable to conditions subsequent becoming impossible to be performed, does not obtain where the estate is devised over on non-performance; in such case, to hold that the estate of the first devisee had become absolute, would be to adjudge that the estate of the substituted devisee had failed, notwithstanding the happening of the event on which it was given, which would be an unfair and unauthorised interference with the rights of the respective objects of the testator's bounty, and an undue curtailment of the testamentary power.

Effect of a gift over, on breach of a condition.

Hence has arisen the important difference existing in many instances between the effect of a condition which is accompanied by a devise or bequest over, and one that is not so accompanied. Thus, it is clear that where real or personal estate is given to a person in case he shall execute a release, or shall not dispute the will, or shall do or decline to do any other prescribed act, and in default the property is given over, such ulterior devise or bequest will take effect, whatever may be the nature of the property, or of the act which is enjoined or prohibited, *Cleaver* v. *Spurling*, 2 P. W. 526; *Simpson* v. *Vickers*, 14 Ves. 341; *Tulk* v. *Houlditch*, 1 V. & B. 248; *Burgess* v. *Robinson*, 1 Mad. 172.

Equitable relief against forfeiture, when there is no gift over.

Where there is no devise or bequest over, and the condition is of a nature to admit of compensation being made, equity will, on subsequent performance, relieve against a forfeiture incurred. Where lands of inheritance were given upon condition that the devisee paid a sum of money within a definite period, and, the money not being paid, the heir entered for a breach of the condition, a Court of Equity, notwithstanding the lapse of the prescribed period for performance, restored the estate to the devisee upon payment of principal, interest, and costs, *Salmon* v. *Vaux*, Toth. 105; *Underwood* v. *Swain*, 1 Rep. Ch. 161; *Barnardiston* v. *Fane*, 2 Ver. 366; *Grimston* v. *Lord Bruce*, 1 Salk. 156; see also *Wallis* v. *Crimes*, 1 Ch. Cas. 89. And this species of relief does not apply to conditions not admitting of after-satisfaction, *Cage* v. *Russel*, 2 Ven. 352; *Re Dickson's Trust*, 1 Sim. (N.S.) 37; 20 L. J. Ch. 33.

Attempt to entail personalty.

(*i*) Any attempt to entail personalty before 1926 gave the absolute interest therein to that person who, if the subject-matter were realty, would be the first tenant in tail or in fee, *Leventhorpe* v. *Ashbie*, Roll. Ab. 831, pl. 1; Tud. L. C. R. P.; *Re Lowman*, [1895] 2 Ch. 348; 64 L. J. Ch. 567.

Heirlooms.

See L. R. 5 H. L. 93, n. (3), for forms under the old law of bequests of heirlooms, drawn by Butler, Coote, Brodie, Duval, and others; and see *Re Beresford-Hope*, [1917] 1 Ch. 287; 86 L. J. Ch. 182.

Sect. 130 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), enables personal estate, including the proceeds of land directed to be sold and

chattels directed to be held as heirlooms, to be held on trusts corresponding to the trusts of an entailed interest in land. NOTES TO PREC. 28.

As to what chattels were or were not included in a bequest of heirlooms, see *Hare* v. *Pryce*, 11 L. T. 101; *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382; 36 L. J. Ch. 107; *Re Moir's Estate*, W. N. 1882, p. 139. In *Fane* v. *Fane*, 2 Ch. D. 711; 46 L. J. Ch. 174, an order was made for the sale of heirlooms, but see *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635; 45 L. J. Ch. 741, and 30 Ch. D. at p. 140. And see note (*l*), *infra*.

(*k*) See note (*f*), Prec. 8.

(*l*) Sect. 67 of the Settled Land Act, 1925, which replaces sect. 37 of the Settled Land Act, 1882, enacts that a tenant for life of lands may sell chattels settled as heirlooms, but as he cannot do so without the order of the Court, the clause in the text may be found useful. But sect. 108 of the Settled Land Act, 1925, must be borne in mind.

(*m*) See note (*a*) to Prec. 8.

(*n*) Trustees having power to invest in the purchase of hereditaments in fee simple in possession may purchase freehold ground-rents, *Re Peyton's Settlement Trust*, L. R. 7 Eq. 463; 38 L. J. Ch. 477.

(*o*) This clause is applicable only where the real and personal estates are intended to go in different directions.

(*p*) See note (*e*) to Prec. 23.

No. XXIX.

PREC. 29.

WILL *devising Real Estates on the Trusts of a Settlement made upon the Testator's Marriage.*

THIS IS THE LAST WILL of me [*testator's name &c.*] WHEREAS by the settlement dated the —— day of —— 19— made in contemplation of my marriage with my wife [*name*] divers hereditaments therein described were settled by me to the use of myself for life With remainder (subject to limitations for securing a jointure rent-charge to my wife if she shall survive me for her life and to a term of five hundred years for raising portions for our younger children) to the first and other sons of our marriage successively in tail male with remainders over Which settlement contains divers powers and provisions concerning the said hereditaments Now I DO HEREBY DEVISE AND SUBJECT all the hereditaments of which I am or shall at the time of my death be competent to dispose To such of the trusts powers and provisions contained in the said settlement concerning the hereditaments thereby settled after the limitation of the said term of five hundred years as at the time of my death shall be capable of effect AND I CONFIRM the said settlement and appoint [*name &c.*] my executor. IN WITNESS &c.

Recital of settlement.

Real estates subjected thereto.

PREC. 30.

No. XXX.

WILL *of a* WIDOW *exercising a Special Power of Appointment under her Marriage Settlement in favour of two spendthrift Sons for Life in Unequal Shares with Remainder to their Children.*

THIS IS THE LAST WILL of me [*name and residence of testatrix*] widow.

Appointment of executors.

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. I APPOINT —— of —— and —— of —— executors of this my will.

Recital of special power.

3. WHEREAS under and by virtue of the settlement dated the —— day of —— made on my marriage with my late husband [*name*] divers trust funds and property are settled in the events which have happened in trust after my death for all or such one or more exclusively of the other or others of the issue whether children or more remote of the said marriage such remoter issue to be born during the lives of me and my said late husband or the life of the survivor of us or within twenty-one years after the death of such survivor at such age or time or respective ages or times if more than one in such shares and with such future and executory or other trusts for the benefit of the said issue or some or one of them and with such provisions for their respective advancement or maintenance or education as therein mentioned and upon such conditions as I shall by deed or deeds as therein mentioned or by will or codicil

Appointment.

appoint Now in exercise of the power for this purpose given me by the said settlement and of all other powers if any enabling me in this behalf I HEREBY DIRECT AND APPOINT that the trustees or trustee for the time being of the said settlement shall from and after my death stand possessed of the trust funds and property comprised in or subject to the trusts of the said settlement upon the trusts hereinafter declared concerning the same

Trusts of one-third.

that is to say As to one-third part or share of the said trust premises UPON TRUST that the said respective trustees or trustee shall if no act or event shall during my lifetime have happened whereby the income of such one-third part or share thereof if belonging absolutely to my son A. B. would at my death (*a*) become vested in or charged in favour of some person or persons or a corporation pay such income unto my said son during his life or until some act or event shall happen within twenty-one years after my death (*b*) whereby if the same income or any part thereof had belonged absolutely to him it would have

become so vested or charged AND after the failure or determination during the life of my said son of the trust hereinbefore declared of the said income in his favour shall during the remainder of his life hold the said income upon the trusts and for the purposes upon and for which the same would for the time being be held if he were dead AND from and after his death the said respective trustees or trustee shall stand possessed of the capital and income of the said one-third part or share of the said trust premises IN TRUST for the children or child of my said son who shall be born in my lifetime and shall attain the age of twenty-one years or in the case of daughters marry under that age and the children or child of my said son who shall be born after my death and shall be living at the expiration of twenty-one years from my death (*b*) or in the case of daughters shall have previously married and if more than one in equal shares PROVIDED ALWAYS and I hereby declare that if the trusts hereinbefore declared in favour of the children of my said son shall fail or determine then subject to the trusts powers and provisions in the said settlement contained or hereinbefore declared and to the powers by law vested in the said respective trustees or trustee and to every exercise of such respective powers the said respective trustees or trustee shall hold the said one-third part or share and the income thereof upon the like trusts and subject to the like powers and provisions as are hereinafter declared concerning the parts or shares hereinafter appointed in favour of my son C. D. and his children or such of the same as shall for the time being be subsisting or capable of taking effect so as to form an accretion to such parts or shares AND as to the remaining two third parts or shares of the said trust premises UPON TRUST that the said respective trustees or trustee shall if no act or event &c. [*as before, substituting* "two third parts or shares" *for* "one third part or share" *and* "my son C. D." *for* "my son A. B." *and* "my said son C. D." *for* "my said son" *and substituting for the last words of the proviso the words* "shall hold the said two third parts or shares and the income thereof upon the like trusts and subject to the like powers and provisions as are hereinbefore declared concerning the part or share hereinbefore appointed in favour of my said son A. B. and his children or such of the same as shall for the time being be subsisting or capable of taking effect so as to form an accretion to such part or share"] AND I declare that the said respective trustees or trustee shall not be liable or responsible for allowing either of my said sons to remain in possession of the enjoyment or benefit of the income hereinbefore appointed in his favour after the determination in his

Trusts of two-thirds.

PREC. 30.

lifetime of the trust in his favour hereinbefore declared unless or until the said respective trustees or trustee shall have received express notice of an act or event determining such trust.

Residuary gift.

4. I DEVISE AND BEQUEATH all the real and personal property whatsoever and wheresoever whereof or whereto I shall be seised possessed or entitled at my death or over which I shall then have a general power of appointment or disposition by will and not hereinbefore otherwise disposed of unto E. F. for his own benefit absolutely.

IN WITNESS &c.

NOTES to Precedent 30.

(*a*) The adoption of this form of words precludes the argument, which the more usual form may possibly leave open, that, *e.g.* a son who has become bankrupt during the life of the testatrix, cannot take any interest although *at her death* he has received his discharge. See *Re Evans*, [1920] 2 Ch. 304; 89 L. J. Ch. 525.

(*b*) There must be an absolute vesting within twenty-one years of the death of the testatrix.

PREC. 31.

No. XXXI.

WILL *of a* BACHELOR *in contemplation of a marriage* (*a*).

THIS IS THE LAST WILL of me [*testator's name residence and quality*] made in contemplation of my marriage with [*name and address of fiancée*].

1. I REVOKE all other wills and testamentary dispositions by me heretofore made.

2. If my marriage with the said —— shall be solemnised before the expiration of twelve months (*b*) from the date of this my will I DEVISE AND BEQUEATH to her all my real and personal property and if such marriage shall not so be solemnised I DEVISE AND BEQUEATH all my real and personal property to my sister [*name*] absolutely.

IN WITNESS &c.

NOTES to Precedent 31.

(*a*) It is provided by sect. 177 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), as follows:—

Sect. 177.—"(1.) A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section eighteen of the Wills Act, 1837, or any other satutory provision or rule of law to the contrary, not be revoked by the solemnization of the marriage contemplated.

"(2.) This section only applies to wills made after the commencement of this Act."

(*b*) "Month" means calendar month, Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 61.

No. XXXII.

PREC. 32.

CONCURRENT WILL *disposing of Lands Abroad* (*a*).

THIS IS so far as relates to the property hereby devised THE LAST WILL of me [*testator's name residence and quality*].

1. I DECLARE that this will shall take effect concurrently with my other will of even date herewith and not revoke or alter the same.

2. I HEREBY DEVISE all my real and immovable property situate at —— to —— of —— and —— of —— for all my estate and interest therein UPON TRUST to sell the same and until sale to manage the same as absolute owners thereof and to receive the purchase money and rents and profits thereof and upon trust to pay the net proceeds of sale and the net rents and profits after payment of all expenses and outgoings to —— and —— or other the trustees or trustee for the time being of my other will aforesaid whose receipt shall be a full discharge therefor to form part of my residuary estate.

Trust for sale

—to pay proceeds to trustees of other will.

IN WITNESS &c.

NOTE to Precedent 32.

(*a*) Real property, including chattels real, follows the *lex loci*. Where the testator has lands in Scotland, a colony, or a foreign country, a separate will is advisable. It should be in the testator's own handwriting and attested by three witnesses, as that will be generally efficacious. See Key & Elphinstone's Prec. (11th ed.), p. 1022, note (*a*); Wills Act, *ante*, sect. 35 and note.

No. XXXIII.

PREC. 33.

CODICIL *revoking the Appointment of Two of Three Trustees and Executors and substituting others.*

THIS IS A CODICIL (*a*) made by me [*testator's name &c.*] to my Will dated the —— day of —— 19— WHEREAS by my said will I have devised and bequeathed certain real and personal estate and given certain powers to [*three trustees*] as trustees and appointed them executors and bequeathed to them a legacy of £—— apiece NOW I REVOKE my said will so far as the said [*two of the three trustees*] are objects thereof and substitute [*names &c. of substituted trustees*] in their place and I DECLARE that my said will shall take effect in the same manner as if the names of the said [*substituted trustees*] had been originally inserted throughout the said will instead of the

PREC. 33. names of the said [*two original trustees*] AND I CONFIRM my said will in other respects IN WITNESS &c. (*b*).

NOTES to Precedent 33.

As to codicils. (*a*) The old signification of the word "codicil" was "a testament not containing the appointment of an executor." But in modern acceptation it denotes simply a supplement to a will, the object of which may be to revoke, confirm, explain, or alter, either wholly or partially, the dispositions of the principal instrument, and, as such, it is, in general, to be considered as part of the original will. And the term "will" in the Wills Act (see sect. 1) extends to a codicil. Where a testator by codicil confirms his will, the will together with all previous codicils is confirmed, *Green* v. *Tribe*, 9 Ch. D. 231; 47 L. J. Ch. 783.

Probate of codicils. Two or more wills or codicils may be entitled to probate, if there is no contradiction or ambiguity upon the face of the instruments, leading by necessary implication to the inference that the testator intended the later to be revocatory of, or substitutional for, the earlier, *Thorne* v. *Rooke*, 2 Cur. 799. But if the instruments are of a different tenor, the later supersedes the earlier, *Bryan* v. *White*, 14 Jur. 919, where two wills were made on two successive days. A so-called codicil, duly executed, though merely revoking prior wills, and making no disposition of the testator's property, is a testamentary instrument entitled to probate, *Brenchley* v. *Still*, 2 Rob. 162; *Brenchley* v. *Lynn*, *ib.* 441; but a mere memorandum of revocation, not disposing of any property or appointing executors, is not, it would seem, entitled to probate, but administration will be granted to the next of kin, with the memorandum annexed, *In b. Hubbard*, L. R. 1 P. & D. 53; 35 L. J. P. 27; *In b. Hicks*, L. R. 1 P. & D. 683; 38 L. J. P. 65; *In b. Fraser*, L. R. 2 P. & D. 40; 39 L. J. P. 20; *In b. Durance*, L. R. 2 P. & D. 406; 41 L. J. P. 60; *Toomer* v. *Sobinska*, [1907] P. 106; 76 L. J. Ch. 19. A paper called a last will and testament, disposing only of real estate, and not revoking a prior will or appointing executors, was admitted to probate as a codicil, *In b. Langhorn*, 5 No. Cas. 512. But as to probate of wills relating only to real estate, see the Supreme Court of Judicature (Consolidation) Act, 1925, s. 155. A codicil to a will may be admitted to probate, although the will itself is not forthcoming, *In b. Clements*, [1892] P. 254; 61 L. J. P. 130. Where there were two codicils, one executed on July 23 and the other on the 30th *totidem verbis*, except the substitution of a clause and the addition of a legacy, there being nothing in the second to revoke the first, both were admitted to probate, *In b. Beetson*, 6 No. Cas. 13. In this case parol evidence to the effect that the second codicil was intended to be in substitution for the first was received but not acted upon. A codicil was executed in duplicate, and one part was destroyed on the execution of a substituted codicil: the remaining duplicate was not admitted to probate, *In b. Hains*, 5 No. Cas. 621.

Valid execution of codicil extends to will or prior codicil. See also the notes to sects. 20, 22 of the Wills Act, *ante*, pp. 41, 47. A will or codicil, not duly executed and attested, is on the principle of incorporation made valid by a subsequent codicil, duly executed and attested, and referring to the will or prior codicil. See notes to sect. 9 of the Wills Act, *ante*, and Wms. Exors. 74 *et seq.*

Revocation of a gift by codicil. The revocation by codicil of a bequest is a revocation of a pecuniary legacy to be paid out of that bequest, *Grice* v. *Funnell*, 1 S. & G. 130.

NOTES TO PREC. 33.

The *onus* is upon those who claim under a codicil, as against a devisee under the will, to show that the intention to displace the devisee is equally clear with the original intention to devise, *Doe* v. *Hicks*, 1 C. & F. 20. See also *Maddison* v. *Chapman*, 4 K. & J. 709; *Barclay* v. *Maskelyne*, Joh. 124; 28 L. J. Ch. 115; *Robertson* v. *Powell*, 2 H. & C. 762; 33 L. J. Ex. 34; *Re Freeman*, [1910] 1 Ch. 681; 79 L. J. Ch. 78.

A bequest, in a second codicil, of all the testator's property "not hereinbefore or by my will or any other codicil disposed of," was held to revoke a general residuary bequest contained in the will, *Earl of Hardwicke* v. *Douglas*, 7 C. & F. 795; *Re Stoodley*, [1916] 1 Ch. 242; 85 L. J. Ch. 226.

Dispositions of will, not disturbed more than necessary.

Where a codicil affects the dispositions of a will or prior codicil, it is an established rule not to disturb the dispositions of the antecedent instrument further than is absolutely necessary in order to give effect to the subsequent codicil, see Jarm. Wills, 177 *et seq.*; and *Ward* v. *Van der Loeff*, [1924] A. C. 653; 93 L. J. Ch. 397.

Confirmation of will by codicil.

A codicil which confirmed a will, by which latter the testator had attempted to exercise a power of appointment which at the date of the will he did not possess, though he did possess the power at the date of the codicil, was held a valid exercise of the power, *Re Blackburn*, 43 Ch. D. 75; 59 L. J. Ch. 208.

Legacies, cumulative or substitutional.

Where two legacies or annuities are given to the same person, one by will, and the other by codicil, it should be expressly declared whether the latter is to be construed as cumulative or substitutional. See Hawkins, Constr. Wills, 352 *et seq.*

Care should also be taken to show distinctly whether a gift by codicil to a legatee under the will is payable out of the same fund, and is privileged with the same exemptions, or subject to the same restrictions, as the legacy given by the will, see Jarm. Wills, 1120; *Johnstone* v. *Lord Harrowby*, 1 D. F. & J. 183; 29 L. J. Ch. 145; *Jauncey* v. *Att.-Gen.*, 3 Gif. 308; *Re Smith*, 2 J. & H. 594; *Re Gibson's Trusts*, *ib.* 656; Hawkins, Constr. Wills, 355. And see *Re Backhouse*, [1916] 1 Ch. 65; 85 L. J. Ch. 146.

(*b*) The attestation clause forms no part of a codicil. Therefore where the attestation clause of a third codicil was as follows: "Signed by the said [testatrix] as a third codicil to her will by which the first codicil is cancelled," and the first codicil was not in the body of the third codicil cancelled at all, the first was held not to be cancelled, but to be entitled to probate, *In b. Atkinson*, 8 P. D. 165; 52 L. J. P. 80.

PREC. 34.

No. XXXIV.

CODICIL *appointing a Trustee and Executor in the place of One deceased.*

THIS IS A SECOND CODICIL made by me [*testator's name &c.*] to my Will dated the —— day of —— 19— whereto I have already made a first codicil dated the —— day of —— 19— WHEREAS [*name*] named in my said will as a trustee and executor has lately died Now it is my will that [*name &c.*] shall be substituted in the place of the said [*deceased trustee*] as one of the trustees and executors (*a*) of my said will AND I DIRECT that my said will shall be read and construed as if the name of the said [*substituted trustee*] had been inserted throughout the said will in the place and instead of the name of the said [*deceased trustee*] AND in all other respects I CONFIRM my said will as altered by my first codicil thereto and this codicil IN WITNESS &c.

NOTE to Precedent 34.

Trustee, executor, revocation.

(*a*) Where the same person is appointed both trustee and executor, a revocation of the appointment as executor is not necessarily a revocation of the appointment as trustee, *Cartwright* v. *Shepheard*, 17 Be. 301; *Worley* v. *Worley*, 18 Be. 58; and similarly the trusteeship may be revoked and the executorship remain. In *Re Park*, 14 Sim. 89; 13 L. J. Ch. 369, the revocation of an appointment of executors and trustees was held not to affect the appointment of the same persons as guardians. In *Sidebotham* v. *Watson*, 11 Ha. 170, an appointment of a person as trustee and executor was, in the circumstances, held to be appointment as an executor only, and not as a trustee of the express trusts of the will. See also *Moss* v. *Bardswell*, 3 Sw. & Tr. 187; 29 L. J. P. 147.

No. XXXV.

CODICIL *confirming Voluntary Deed of Gift to Charity* (*a*).

THIS IS A CODICIL made by me [*testator's name &c.*] to my Will dated the —— day of —— 19—.

1. WHEREAS I have lately purchased certain lands situate at —— in the County of —— and by an Indenture dated the —— day of —— 19— and made between myself of the one part and —— of the other part the said lands were assured to the said —— upon the charitable trusts therein declared Now I hereby devise the said lands in the event of my death within twelve calendar months after the making of the said Indenture including in those twelve calendar months the days of the

making of the said Indenture and of my death to the said —— UPON THE TRUSTS in that Indenture declared.

2. I DIRECT that any death duties which by reason of my death may become payable in respect of the said lands and the interest payable in respect of such duties shall be paid by my trustees out of my residuary estate (*b*) and I DIRECT the said —— or other the trustees or trustee of the said Indenture to apply for an order under section 8 of the Mortmain and Charitable Uses Act 1891 sanctioning the retention of the said land.

3. In all respects save in so far as this codicil may affect the same I CONFIRM my said Will IN WITNESS &c.

NOTES to Precedent 35.

(*a*) See Mortmain and Charitable Uses Act, 1888, s. 4 (7); Mortmain and Charitable Uses Act, 1891, s. 5; Settled Land Act, 1925, s. 29; and *ante*, note (*b*) to Prec. 24.

(*b*) See Finance (1909—10) Act, 1910, s. 59.

MISCELLANEOUS FORMS.

Beginnings of wills.

THIS IS THE LAST WILL of me —— of —— in the county of —— gentleman.

THIS IS THE LAST AND ONLY (*a*) will of me A. B. late of —— but now of —— merchant to take effect only in the event of my not leaving any issue living at my death.

(*a*) The insertion of the word "only" has in some books of Precedents been regarded as equivalent to a revocation of prior wills. See 11 Byth. Jarm. 429 (*c*). But this opinion is not reliable, *Simpson* v. *Foxon*, [1907] P. 54. See note (*d*) to Prec. 1, *ante*.

THIS IS THE LAST WILL of me A. B. of —— in the county of —— in England late a captain in His Majesty's —— Regiment of Foot a domiciled Englishman but now residing temporarily (*b*) for the benefit of my health [*or* for the purposes of study *or* for the education of my children] at —— in France (*c*).

(*b*) As to the effect given to a testator's description of himself in his will in respect of his domicile, and the permanent and temporary nature of his residence abroad, see *Re Steer*, 3 H. & N. 594; 28 L. J. Ex. 22; *Att.-Gen.* v. *Pottinger*, 6 H. & N. 733; 30 L. J. Ex. 284; *Att.-Gen.* v. *Kent*, 1 H. & C. 12; 31 L. J. Ex. 391. A declaration of intention to retain an English domicile, though entitled to weight, will not prevail against facts showing the acquisition of a foreign domicile. See further in the Appendix on Domicile, *post*, p. 407.

(*c*) This will should be executed and attested as required by the law of England, but by virtue of 24 & 25 Vict. c. 114 (see Appendix), would be entitled to probate in this country, and be valid as to personal estate, if executed according to the forms required by the law of France.

Appointment of executors and trustees.

I APPOINT —— of &c. and —— of &c. to be executors and trustees of my will.

Appointment of Settled Land Act trustees.

I APPOINT —— of &c. and —— of &c. to be trustees of the settlement created by this my will for the purposes of the Settled Land Act 1925 (*d*).

(*d*) See note (*a*) to Prec. 5. An infant cannot be appointed trustee, Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 20.

Appointment of Public Trustee to be executor and trustee.

I APPOINT the Public Trustee to be executor and trustee of this my will [and also to be trustee for the purposes of the Settled Land Act 1925 (*e*)] *Add if desired* And it is my wish that under sub-section (2) of section 11 of the Public Trustee Act 1906 the firm of Messrs. —— solicitors may be employed in relation to the trusts of this my will.

(*e*) See p. 154, *ante*. The Public Trustee cannot accept a trust involving the selection of charitable objects for the testator's bounty, *Re Hampton*, 63 S. J. 68.

Appointment of Public Trustee to be trustee.

I APPOINT —— of &c. to be executor and the Public Trustee to be the trustee of this my will.

Appointment of Public Trustee to be custodian trustee.

I APPOINT —— of &c. to be executor and trustee and the Public Trustee to be custodian trustee of this my will (*f*).

(*f*) See note (*e*), above.

Appointment of Public Trustee to be executor and custodian trustee.

I APPOINT the Public Trustee to be executor —— of &c. and —— of &c. to be trustees and the Public Trustee to be custodian trustee of this my will (*g*).

(*g*) See note (*e*), above.

Appointment of bank or company to be executors and trustees.

I APPOINT the —— hereinafter called the bank [company] the executors and trustees of this my will and I declare that all costs and expenses incurred by the bank [company] in the execution of the trusts of this my will may be retained by them with interest at the rate of five per centum per annum from the time of their being paid until repayment out of any moneys forming part of my estate and that the bank [company] shall be entitled to remuneration out of my estate free from all death duties in accordance with the scale of fees in use by the bank [company] at the date of this my will (*h*) AND I declare that if before the time of my death the bank [company] shall have gone into liquidation for the purpose of amalgamation or reconstruction or otherwise shall have ceased to exist and if at the time of my death there shall be any other corporation which shall have been formed to acquire or shall have then acquired or shall be carrying on the business formerly carried on by the bank [company] then this my will shall be read and construed as if the name of such other corporation were substituted for that of the bank [company] throughout.

(*h*) Inquiry should be made of the bank or company as to any preferred form of appointment. See *In b. Hunt*, [1896] P. 288; 66 L. J. P. 8; *Re Richards*, [1901] 2 Ch. 399; 70 L. J. Ch. 699. And see sect. 36 (3) of the Trustee Act, 1925 (15 Geo. 5, c. 19), and sect. 14 of the Administration of Estates Act, 1925 (15 Geo. 5, c. 23).

Appointment of trustees, executors, and guardians.

I APPOINT —— of —— and —— of —— to be my trustees and executors and together with my wife to be guardians of my children during their respective minorities (*i*).

(*i*) See also Prec. 12, clause 2, and note.

Appointment of special executors of settled land, and of other persons as general executors.

I APPOINT the persons who are at my death the trustees of the settlement created by an indenture of settlement dated the —— day of —— 19— under which I have a life interest in certain hereditaments situate at —— in the county of —— my special executors in regard to the said hereditaments and I APPOINT —— of —— and —— of —— to be my general executors in regard to my other property and assets (*j*).

(*j*) See sect. 22 of the Administration of Estates Act, 1925 (15 Geo. 5, c. 23).

Conditional appointment of son to be trustee and executor.

I DECLARE that if my said son Henry B. shall at the time of my death have attained the age of twenty-one years he shall be a trustee and executor of my will which in that case shall be construed and take effect as if his name had been herein inserted throughout along with and immediately before the names of the said [*trustees*] A. B. and C. D. (*jj*).

(*jj*) See note (*d*), *ante*, p. 348.

Trustees to reside within certain limits; appointment of new trustees.

I DIRECT that any person herein appointed or to be appointed a trustee who shall cease to be resident in the town of —— or within —— miles from the parish church [*or* town-hall] thereof (*k*) shall cease to be a trustee and that any and every vacancy in the trusteeship of my will shall be supplied as soon as may be by the appointment of a fit substitute resident as aforesaid such appointment to be made by my wife during her widowhood and after her death or marriage in the manner prescribed by law (*l*).

Mode of measuring distances.

(*k*) Distances are measured, not by the nearest practicable way of access, but "as the crow flies." Such at least is the method adopted in construing Acts of Parliament, *Reg.* v. *Saffron Walden*, 9 Q. B. 76; 15 L. J. M. C. 115; *Lake* v. *Butler*, 5 E. & B. 92; 24 L. J. Q. B. 273; and contracts, *Duignan* v. *Walker*, Joh. 446; 28 L. J. Ch. 867; *Mouflet* v. *Cole*, L. R. 8 Exch. 32; 42 L. J. Ex. 8; where mention is made of a given distance without specifying the mode of measurement. It is presumed that the same method would be applicable to the measurement of distances mentioned in a will; and that if testator means the measurement to be taken along the roads, streets, railways, or other ways of communication, he must express his intention.

(*l*) See note (*f*), Prec. 6.

Appointment of son to be trustee on attaining twenty-one.

I APPOINT my son William on his attaining the age of twenty-one years to be a trustee of this my will (*ll*) and I direct that my will shall from the time of his acceptance of the trusteeship take effect and be construed as to the property then remaining subject to the trusts hereof in the same manner as if my said son had been originally named a trustee jointly with the said M. and N. And I declare that until the said appointment of my son William shall take effect such appointment shall not fetter or prejudice the exercise of the trusts powers or discretions hereby given to the said M. and N. or the survivor of them or other the trustees or trustee to be from time to time appointed in their or his stead And that if my son William shall die before attaining the age of twenty-one years or if on attaining that age he shall be incapable or unfit or shall refuse or omit to act as a trustee it shall be lawful for but not compulsory on the trustees or trustee for the time being of this my will to appoint a trustee in the place of my son William it being my wish that there shall be from time to time not more than three nor less than two trustees of my will.

(*ll*) See note (*d*), *ante*, p. 154. As to the effect of appointing an infant to be an executor, see sect. 20 of the Administration of Estates Act, 1925 (15 Geo. 5, c. 23).

Appointment of wife during widowhood.

I APPOINT my wife [*name*] and —— of &c. and —— of &c. to be trustees and executors of my will But if my wife shall marry again she shall thereupon cease to be trustee and executor of my will which shall thenceforward be construed and take effect and be executed in the same or the like manner as if the said —— and —— [*other trustees*] had been originally appointed the sole trustees and executors.

Appointment of special executors;

—as to trade;

I APPOINT my wife [*name*] and my son [*name*] and my brother [*name*] to be executors of my will as to my property and assets which at the time of my death shall be embarked in trade (*m*) And I APPOINT A. B. of &c. C. D. of &c. and E. F. of &c. to be general executors and trustees of this my will.

(*m*) See 2 Wms. Exors. 1498; and *ante*, p. 287, note (*a*).

—in respect of a debt.

I APPOINT A. B. of &c. and C. D. of &c. to be my executors in respect of any debt or debts (*n*) owing to me by my brother [*name*] at the time of my death.

Debtor appointed executor;

(*n*) The appointment of testator's debtor to be executor destroys the remedy against him at law for the debt. By the appointment of a special executor, as in the text, the legal remedy is vested in him. But the appointment of a debtor to be executor is no more than a parting

with the action, and does not operate in equity as a release of the debt as against legatees; *a fortiori*, the debt is assets for the payment of testator's debts. See *Ingle* v. *Richards*, 28 Be. 366, where a debt not recoverable at law (because the debtor was executor) or in equity (because barred by the Statute of Limitations) was held assets in the hands of a proving executor. But as to rebutting any claim in equity by evidence of a continuing intention to forgive a debt due from the person appointed executor, see *Strong* v. *Bird*, L. R. 18 Eq. 315; 43 L. J. Ch. 814; *Re Applebee*, [1891] 3 Ch. 422; 60 L. J. Ch. 793; *Re Pink*, [1912] 2 Ch. 528; 81 L. J. Ch. 753. And see *post*, p. 366, note (*k*), and p. 367, note (*kk*).

—of mortgage debt, specifically bequeathed;

I BEQUEATH to A. B. of &c. the sum of £—— owing to me on mortgage of freehold hereditaments at —— in the county of —— created by indenture dated the —— day of —— 19— and made between P. Q. of the one part and myself of the other part AND I DEVISE all the hereditaments comprised in such mortgage to the said A. B. in fee simple subject to the equity of redemption subsisting therein.

—as to leaseholds specifically bequeathed.

I GIVE my leasehold house No. — —— street in the county of —— with the garden and appurtenances thereto belonging or usually enjoyed therewith to my son [*name*] he paying the ground rent and performing the lessee's covenants in respect of the said leasehold premises and taking the improved rent current at my death without any apportionment thereof And I APPOINT my said son my executor as to the same leasehold premises (*o*) and direct that the estate duty and costs of and incidental to the obtaining of a limited probate by my said son shall be paid out of my residuary estate and (except as aforesaid) I APPOINT [*names &c.*] to be executors of my will.

Special executor, reason for.

(*o*) This special appointment of an executor is made for the purpose of transferring the liability of the executors for general purposes under the covenants in the lease from the latter, who have simply a fiduciary interest in the leasehold, to the person having the beneficial ownership. See *Lynch* v. *Bellew*, 3 Phillim. 432; and as to executors in or for a particular country, *In b. Wallich*, 3 Sw. & Tr. 423; 33 L. J. P. 87; *Velho* v. *Leite*, 3 Sw. & Tr. 456; 33 L. J. P. 107; *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187; 71 L. J. Ch. 164. Where a testator gave specific legacies, but did not dispose of his residue, and appointed his daughter executrix for all property not named in the will, probate to the daughter was refused, *In b. Wakeham*, L. R. 2 P. & D. 395; 41 L. J. P. 46; Wms. Exors. 175 *et seq.*

Specific bequest of building land,

I BEQUEATH all that piece of building land containing about —— square yards situate in —— street —— in the county of —— which I have agreed to take on a building lease from Mr. —— and all buildings and the wood stone bricks lime and other materials which shall be upon the said piece of land at

my death to my son —— absolutely he nevertheless paying the rent and performing the tenant's or lessee's covenants and agreements in respect of the same piece of land (*p*) and indemnifying my estate therefrom except that the apportioned current rent of the said piece of land down to and inclusive of the day of my death shall be paid out of my residuary estate I APPOINT my same son my executor as to the premises comprised in the last bequest And as to all other my personal estate I APPOINT —— of &c. and —— of &c. to be my executors.

—and appointment of special executor in respect thereof.

(*p*) In the absence of this direction as to the burthen of the covenants to build, the legatee could (contrary, no doubt, in most cases to the wishes of the testator) require the contract to be performed at the cost of the residuary estate, *Marshall* v. *Holloway*, 5 Sim. 196. But see as to this decision, *Fitzwilliams* v. *Kelly*, 10 Ha. 266; 22 L. J. Ch. 1016.

Covenant to build.

I DEVISE AND BEQUEATH unto —— of —— and —— of —— hereinafter called my colonial trustees all my real and personal property situate and being in the colony of —— expressly including all debts and other choses in action which shall be recoverable by action or other legal proceedings in such colony UPON TRUST to sell and convert the same and until sale to manage the same as absolute owners thereof and to receive the purchase money and rents and profits and income thereof and upon trust to pay the net proceeds of sale and the net rents and profits and income thereof after payment thereout of all outgoings and expenses of management and realisation or otherwise incurred by my colonial trustees and any debts owing by me in the said colony of —— to my trustees to be held by them as part of my residuary estate.

Devise and bequest of property in a colony.

[I DIRECT (*q*) that an anatomical examination be made of my body as soon as possible after my death by two competent surgeons to be selected by my executors and such surgeons shall forthwith deliver a report in writing of the result of such examination to my executors who shall on receipt of such report pay to each of the said surgeons as a remuneration for his trouble a sum of money not exceeding —— guineas (*r*).]

Directions as to *post-mortem* examination.

(*q*) As wills are often not read until after the testator's funeral, it may be deemed wiser not to insert these clauses, here placed in brackets, in wills, but to enclose them in an envelope addressed to the executors with instructions written outside, "To be opened immediately after my death."

(*r*) By the "Act for regulating Schools of Anatomy" (2 & 3 Will. 4, c. 75), it is enacted (s. 8), "that if any person, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, shall direct that his body after death be examined anatomically, or shall nominate any party by this Act

Anatomy Act.

Disposal of body after death.

authorised to examine bodies anatomically to make such examination; and if before the burial of the body of such person, such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and, in case of any such nomination as aforesaid, shall request and permit any party so authorised and nominated as aforesaid, to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative or any one or more of such person's nearest known relatives being of kin in the same degree, shall require the body to be interred without such examination." And by the 7th section it is made "lawful for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker or other party entrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless, to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his lifetime, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination."

A direction by will as to the disposition of the testator's body cannot be enforced; there is no property in a corpse, but the executors have a right to possession of it, *Williams* v. *Williams*, 20 Ch. D. 659; 51 L. J. Ch. 385.

Directions as to funeral.

[I DIRECT that my body be interred without ostentation at a cost not exceeding £—— in the family vault in the churchyard of the parish church of ——.]

[I DIRECT that my remains be buried with plainness and privacy in the cemetery of ——.]

[I DIRECT that [my body be buried in an open or wicker-work coffin and that] the expense of my funeral shall not exceed £——.]

Cremation.

[I DIRECT that my body be burnt and that my ashes be disposed of as my executors shall think fit (*s*).]

(*s*) It is lawful to burn a dead body, but if it be done in such a way as to amount to a public nuisance, this is a misdemeanour. It is also a misdemeanour to burn or otherwise dispose of a dead body with intent to prevent the coroner from holding an inquest on it, in a case where the inquest is one which the coroner has jurisdiction to hold, *Reg.* v. *Price*, 12 Q. B. D. 247; 53 L. J. M. C. 51; *Reg* v. *Stephenson*, 13 Q. B. D. 331; 53 L. J. M. C. 176. See *ante*, p. 353, note (*r*) and note (*t*) *infra*.

Against cremation.

[I DIRECT that in no circumstances shall my body be *cremated* (*t*).]

(*t*) By the Cremation Regulations, 1920 (1920, No. 1286), r. 4, it is unlawful to cremate a person who has left written instructions to the contrary.

I GIVE the sum of £—— to A. B. of —— in the county of —— and if he shall die in my lifetime [leaving issue surviving me I give the same sum to his executors or administrators as part of his personal estate] *or* [the legacy given to him shall not lapse but shall go and devolve in the same manner as if he had survived me and died immedately after my death but so that this direction shall take effect by way of direct gift to the person or persons beneficially entitled under his will or on his intestacy and shall not make the legacy part of his personal estate so as to be liable for his debts or other duty (*tt*).] Provision against lapse.

(*tt*) The object of this alternative clause is to avoid double death duty, but it has the disadvantage of putting the executors to the trouble of ascertaining who are the beneficiaries.

I GIVE to my said trustees [*names*] the sum of £—— which is to bear interest after the rate of —— per cent. per annum from the time of my death Upon the trusts and for the purposes hereinafter expressed concerning the same. Pecuniary legacy to trustees upon trusts after declared.

I GIVE to my son —— and my wife the sum of £—— free from legacy duty to be raised and paid at the end of five years from my death (unless my executors shall think fit sooner to raise the same) together with interest thereon from my death at the rate of —— per centum per annum such interest to be paid by equal half-yearly payments in the meantime Upon and for the trusts and purposes hereinafter expressed concerning the same. Legacy—payable at the end of five years, or sooner at discretion of executors.

I BEQUEATH the pecuniary legacies following (*u*) namely To my wife the sum of £—— for her immediate use such legacy to be entitled to priority over every other legacy herein bequeathed To each of my other trustees and executors the sum of £—— as an acknowledgment for his trouble in executing the office of trustee and executor of my will To the said [*name*] individually and without reference to his office of trustee and executor the sum of £—— To A. B. of &c. the eldest son of R. B. of —— the sum of —— To each of the domestic servants [*or* each of my indoor and outdoor servants] [*or* each of my indoor and outdoor servants not in receipt of weekly or daily wages] who shall be in my service at my death and not be under notice to leave whether given or received a sum equal to one year's wages (in addition to any moneys which may be then owing by me to him or her) and a suit of mourning at the discretion of my executors To &c. [*other pecuniary legacies*] And I direct the legacy hereinbefore bequeathed to my wife to be paid or Pecuniary legacies; Legacy to servants; —time of payment.

retained out of the first moneys which shall come to the hands of my executors and the other legacies hereinbefore bequeathed to be paid or retained at the end of twelve calendar months from my decease unless my executors shall think fit sooner to pay or retain the same.

(*u*) See Prec. 6, clause 3 and note, and see Prec. 11, clause 7 and notes.

Legacy to charity (*x*).

I GIVE the sum of £—— to the [Society for Promoting Christian Knowledge] [Catholic Truth Society] [*or otherwise*], [free of duty], and I declare that the receipt of the person who professes to be the treasurer or other proper officer for the time being (*y*) of the said society shall be a sufficient discharge therefor.

(*x*) The advertised Forms of Bequest supplied by charitable societies are often out of date, and it is not always safe to adopt them. See as to this and the two following forms, note (*b*) to Prec. 24.

(*y*) As to the meaning of the words "for the time being," see *Re Daniels*, 118 L. T. 435.

For the poor of a parish.

I BEQUEATH to the rector [vicar] for the time being of the parish of —— in the county of —— the sum of £—— [free of duty] to be distributed by him at his discretion amongst such poor inhabitants of that parish as he shall select.

Legacy to be invested for the poor of a town (*z*).

I BEQUEATH to my trustees the sum of £—— [free of duty] upon trust to invest the same and apply the yearly income thereof for the benefit of the poor and deserving widows in the city of [Canterbury] in the county of [Kent].

(*z*) Within twelve months from the death of the donor, a Memorial stating the gross annual income, investment, and objects of this gift, must be registered with the Clerk of the Peace of the City and the Clerk of the County Council, under sect. 2 of 52 Geo. 3, c. 102, as amended by sect. 3 (15) of the Local Government Act, 1888; and such clerks are required to notify the same in the London Gazette. But where there is a direction to invest permanently in Government or Public stocks or funds, registration is not required; 52 Geo. 3, c. 102, s. 10.

To governors of Queen Anne's Bounty.

I BEQUEATH to the governors of the bounty of Queen Anne for the augmentation and maintenance of the poor clergy the sum of £—— to be applied and disposed of by them for the augmentation of the living (*a*) of —— in the county of ——.

(*a*) "Living or cure" is the expression in 43 Geo. 3, c. 107. The word "vicarage," found in some Precedent books, might conceivably not be what is intended, or be inapplicable to the nature of the incumbency.

I BEQUEATH to the Parochial Church Council (*b*) of the parish of —— in the county of —— the sum of £—— Consols to be held by them upon trust to apply the dividends thereon for the following ecclesiastical purposes in the said parish that is to say) :— To Parochial Church Council.

(*b*) See the Parochial Church Councils (Powers) Measure, 1921 (11 & 12 Geo. 5, No. 1). By section 4 the powers of the Vestry are transferred to the Council except election of churchwardens and sidesmen and administration of ecclesiastical charities. Among other duties transferred the Council will have the financial affairs of the Church, care of the fabric and ornaments, care of the churchyard, and the duties of Church Trustees under the Compulsory Church Rate Abolition Act, 1868. Under section 5 the Council may acquire, by gift or otherwise, any property real or personal for any "ecclesiastical purpose." Parochial Church Council.

I BEQUEATH the sum of £—— to the representative body of the church of Ireland, incorporated under the name of the representative church body, in trust for the said church. To the Church of Ireland.

I BEQUEATH to A. B. the sum of £—— absolutely to be paid to him immediately after my death in priority to all other bequests hereby made and I request him to apply the same in such manner as in a letter to be hereafter addressed to him but not yet written I hope to state But I declare that such request shall not create any trust of any kind whatsoever or raise any obligation on his part in law so to apply the same whether before my death my request shall have become known to him or not (*c*). Bequest for a purpose not valid in law.

(*c*) This was the form of gift used by a testator for the saying of mass for the repose of his soul. See Maitland on Equity, p. 62; Elph. Introd. Conv. p. 579. The expressed wishes of a testator assented to would create a trust, *Re Gardner*, [1920] 2 Ch. 523; 89 L. J. Ch. 649. Compare *Re Falkiner*, [1924] 1 Ch. 88; 93 L. J. Ch. 76. A gift for masses, although good in Ireland, *O'Hanlon* v. *Logue*, [1906] 1 Ir. R. 247, was long considered invalid in England, *Re Egan*, [1918] 2 Ch. 350. But the latter decision has been reversed by H. L. in *Bourne* v. *Keane*, [1919] A. C. 815; 89 L. J. Ch. 17; see Tyssen's Charitable Bequests, (2nd edition, 1921), 100, and a direct gift for masses is now valid, and may be made in the following form.

I BEQUEATH to [the Roman Catholic Bishop of —— for the time being at my death] £—— for masses free of duty. Bequest for masses.

I BEQUEATH the sum of £—— to my said trustees [*names*] to be paid or retained at the end of —— calendar months next Bequest to trustees, to

carry interest. Upon trust for younger children *nominatim*. On death of any son under twenty-one, or on becoming the eldest son; or on death of any daughter under twenty-one; out of the share of the children so dying, £—— to be added to the share of each of the other younger children, and the balance to fall into the residue.

after my death and to carry interest from my death at the rate of —— per cent. per annum and to be held by my trustees Upon the trusts and subject to the provisions following that is to say IN TRUST for my younger children the said A. B. C. B. D. B. and E. B. in equal shares but in case any of such younger children being sons shall die under the age of twenty-one years or become an eldest or only son entitled under the provisions hereinafter contained to the possession of my real estate or to the receipt of the rents and profits thereof before he shall have attained that age or in case any of my said younger children being daughters shall die under the age of twenty-one years without having been married [with the previous consent in writing of her or their guardian or guardians] or become an eldest or only daughter entitled as aforesaid then with or out of the share and accretions under this clause to the share of every child so dying or becoming entitled as aforesaid the sum of £—— shall be added to the share of each other of my said younger children and subject to the making of such additions the share and accretions thereto of every child so dying or becoming entitled as aforesaid shall sink into the residue of my personal estate.

Life annuities; —time of payment;

I BEQUEATH the several annuities following namely To [*name &c.*] an annuity of £—— To [*name*] the wife of [*name*] an annuity of £—— for her separate use without power of anticipation To &c. [*other annuities*] the said annuities to be payable during the respective lives of the several annuitants in equal half-yearly portions the first of such portions to be paid at the end of six calendar months from my death.

Annuity, bequest of, to valet.

I GIVE to G. A. who now resides at S. in Italy and who formerly lived with me as travelling servant for —— years or thereabouts an annuity of £—— free from legacy duty and all other deductions to be paid to the said G. A. during his life until he shall do or suffer any act or thing whereby the said annuity or any part thereof would but for this provision be assigned charged or incumbered and I direct that the said annuity shall be paid to the said G. A. personally or to such person as he shall from time to time but not by way of anticipation authorise to receive the same by equal half-yearly payments on the —— day of —— and the —— day of —— in every year and that the first half-yearly payment thereof shall be made on such of the said days as shall first happen after my death And I request that my executors will make provision for the punctual payment of the said annuity out of my personal estate

periodically as it becomes due to the said G. A. at S. or at such other place as he may happen for the time being to reside in Provided always that it shall be lawful for my executors to accept the bond of the said —— the residuary legatee of my personal estate as sufficient security for the payment of the said annuity and that it shall not be incumbent upon them in that case to appropriate or set apart any fund to answer the same.

Power to accept bond of residuary legatee as a security.

I DIRECT my trustees as soon as may be after my death to sink the sum of £—— hereinbefore bequeathed to them [*or* one-fifth part of my net residuary estate] in the purchase from any person or persons or from any reputable insurance company in Great Britain of a clear irredeemable annuity to be payable to my trustees during the life of my nephew K. B. of &c. in equal portions half-yearly or quarterly and if not purchased from any insurance company to be well secured on real or Government securities or other good security in the discretion of my trustees And upon further trust to receive the annuity to be so purchased as last aforesaid as the same shall from time to time become due and if my said nephew shall not at my death be an undischarged bankrupt to pay the same into the hands of my said nephew until he shall become bankrupt or shall do or suffer some act or thing whereby the said annuity shall be wholly or partially assigned charged or incumbered (*d*) And on and after the bankruptcy or doing or suffering of any such act or thing as aforesaid then the said annuity shall cease to be payable to my said nephew and shall be held by my trustees upon the trusts following &c.

Trust to sink part of residue in a life annuity to be paid to the *cestui que vie* till bankruptcy or alienation.

(*d*) See *Re Muggeridge's Trusts*, Joh. 625; 29 L. J. Ch. 288, as to the effect of insolvency before the annuity was actually payable; and *Dorsett* v. *Dorsett*, 30 Be. 256; 31 L. J. Ch. 122, in which case it was held that a clause of forfeiture on bankruptcy affected a share which accrued after the bankrupt had obtained his certificate, as well as his original share, and that the effect was to accelerate the interests in both shares of those persons claiming by reason of the forfeiture. See Jarm. Wills, 1514. A forfeiture may result from the debtor's petition under the Bankruptcy Acts. See Jarm. Wills, 1497 *et seq.*

Forfeiture.

As to the effect of foreign or colonial bankruptcies, see *Re Blithman*, L. R. 2 Eq. 23; *Re Hayward*, [1897] 1 Ch. 905; 66 L. J. Ch. 392; Jarm. Wills, 1511; and *Re Anderson*, [1911] 1 K. B. 896; 80 L. J. K. B. 919.

In *Adams* v. *Adams*, [1892] 1 Ch. 369; 61 L. J. Ch. 237, the forfeiture clause provided that if the legatee should attempt to interfere in the management of the testator's estate, his annuity should be thereby forfeited. The annuitant commenced an action against the trustees of the estate out of which his annuity was payable, alleging non-payment of his annuity, waste of the estate and other charges, all of which charges he failed to establish. The action was held to be frivolous and an attempt

to interfere in the management, and the annuitant was declared to have forfeited his annuity. See *Re Porter*, [1892] 3 Ch. 481; 61 L. J. Ch. 688; *Re Williams*, [1912] 1 Ch. 399; 81 L. J. Ch. 296; *Re Smith*, [1916] 1 Ch. 369. For a case where a reversionary interest was given over in the event of the legatee being under "legal disability" to take the same for his own benefit at the death of the tenant for life, see *Re Carew*, [1896] 2 Ch. 311; 65 L. J. Ch. 686.

Where the clause provides for forfeiture on the legatee's "anticipating," and the legatee executes a deed by which he attempts to anticipate, but which proves inoperative, the forfeiture will not take effect, as "anticipating" will not be read as meaning "attempting to anticipate," *Re Wormald*, 43 Ch. D. 630; 59 L. J. Ch. 404. If the clause provides for forfeiture on alienation, or attempted alienation, a covenant in the marriage settlement of the legatee to settle any moneys coming to him under the will does not work a forfeiture, *Re Crawshay*, [1891] 3 Ch. 176; 60 L. J. Ch. 583.

A document of charge which, as between the person giving it and the person to whom it is given, is voidable, or liable to be set aside by the Court, and is avoided or set aside accordingly, will not operate as a forfeiture, *Re Sheward*, [1893] 3 Ch. 502.

Under sect. 33 of the Trustee Act, 1925 (15 Geo. 5, c. 19), an annuity can be given on the "protective trusts" thereby declared. See *ante*, p. 207.

Charge of legacy on specific real estate, with provision for discharge thereof.

I CHARGE the said sum of £—— in aid of my personal estate (*e*) upon my freehold estates at —— And I declare that upon the investment by the trustees or trustee for the time being of this my will of the said sum of £—— in or upon any authorised trust investment or investments my said personal estate and the said estates at —— shall thenceforth be liberated from all and every trust charge and liability in respect of the said sum of £—— and all interest thereon And I declare that the production or other proof of the execution by the trustees or trustee of this my will of a deed declaring that such sum has been invested pursuant to the directions of this my will and the trusts upon which they or he held the same sum at the time of the investment thereof or a recital to the same effect in any deed executed by the trustees or trustee for the time being of this my will shall in favour of purchasers or mortgagees of the hereditaments so charged in aid of my personalty with the said sum of £—— be conclusive evidence of the due investment thereof and shall exonerate such purchasers or mortgagees therefrom and from all liability in respect of the insufficiency of the said investment and securities and from seeing to the application of the same sum and from inquiring into or taking notice of the misapplication thereof or of any part thereof.

Charge of legacies on real estate.

(*e*) A mere charge of debts or legacies upon the realty, or a charge upon the realty in aid of the personalty, does not alter the order and priority in which the different kinds of property are liable for the satis-

faction of the debts or legacies, Jarm. Wills, ch. 54; Hawkins, Constr. Wills, ch. 20. There must appear in the will not merely the intention to charge the realty, but also a clear intention to exonerate the personalty, before the primary liability is transferred from the latter to the former. If a testator by deed conveys real and personal property to trustees on trust after his death to pay his debts and funeral expenses, and after reciting the deed in his will devises and bequeaths the residue of his real and personal estate not included in the deed, the charge of debts in the deed is not enough to shift the primary liability from the testator's general personal estate, but the charge of debts on the personal property included in the deed is enough to fasten the primary liability on this part of the personalty, *Trott* v. *Buchanan*, 28 Ch. D. 446; 54 L. J. Ch. 678.

And a general charge of annuities and legacies upon all the testator's real and personal estate (and therefore in terms including estates devised specifically) will not alone be sufficient to bring the specifically devised estates within the scope of the charge, *Conron* v. *Conron*, 7 H. L. C. 168. But see *Re Emmerton's Estate*, 3 D. J. & S. 338; *Lord Portarlington* v. *Damer*, 4 D. J. & S. 161; *Mannox* v. *Greener*, L. R. 14 Eq. 456.

As to the implied charge of legacies upon the real estate created by a residuary devise following bequests of legacies, see *Greville* v. *Browne*, 7 H. L. C. 689; *Hassel* v. *Hassel*, 2 Dick, 527; *Re Bawden*, [1894] 1 Ch. 693; 63 L. J. Ch. 412; *Re Boards*, [1895] 1 Ch. 499; 64 L. J. Ch. 305; *Re Balls*, [1909] 1 Ch. 791; 78 L. J. Ch. 341.

Corpus of estate at wife's disposal;

I DEVISE and bequeath all my real and personal estate to such persons for such estates or interests and in such manner as my wife shall from time to time by deed or writing under her hand or by will or codicil appoint or as to chattels passing by delivery to whom my wife shall deliver the same by way of gift or otherwise And in default of any such appointment or delivery To my wife during her life And after her death as to such parts of my real and personal estate as she shall not have disposed of as aforesaid I devise and bequeath the same as follows—

—in default to her for life; with gift over.

Separate estate of married woman—special directions as to payments through a banker or agent.

I DECLARE that notwithstanding the trusts hereinbefore contained of the annual income of the said sum of £—— and the investments thereof for the separate use of my said daughter Caroline it shall be lawful for my trustees so long as they shall deem it expedient so to do to pay or remit the annual income of the said sum of £—— and the investments thereof to such banker or agent as my said daughter shall from time to time appoint or to authorise such banker or agent to receive the same for the purpose of remittance or payment as my said daughter shall direct and every payment or remittance which shall be made by my trustees to or through the agency of a banker or agent appointed by my said daughter shall until such appointment be withdrawn by her be a good discharge to my trustees for the money which shall be so paid but this provision shall

not preclude my trustees from requiring from time to time as the said annual income shall arise a special direction from my said daughter respecting the application thereof or otherwise from paying the same into her proper hands if my trustees shall deem it advisable so to do (*f*).

(*f*) This clause is framed to remove the doubt whether a trustee is justified in remitting income through a banker or agent to a married woman permanently resident abroad. See sect. 23 of the Trustee Act, 1925 (15 Geo. 5, c. 19).

Trinkets, &c., to wife.

Paintings, &c., as heirlooms.

I GIVE to my wife [*name*] all the trinkets jewellery paraphernalia and ornaments of her person which shall have been used by her before my death And as to my gold and silver plate and my collection of paintings in oil I direct that the same shall be held and enjoyed as heirlooms with the freehold estates comprised in my marriage settlement (*ff*).

(*ff*) See sect. 130 (3) of the Law of Property Act, 1925 (15 Geo. 5, c. 20).

"Personal chattels" to wife.

I BEQUEATH to my wife [*name*] all my personal chattels as defined by section 55 (1) (x) of the Administration of Estates Act 1925 [free of duty] (*g*) exclusive of any chattels used at my death for business purposes and of money or securities for money.

(*g*) Sect. 55 (1) (x) of the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), defines "personal chattels," for the purposes of the Act, as follows:—

"(x) 'Personal chattels' mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money:"

Wife to have the use of household furniture, &c.;

—delivery and inventory;

I BEQUEATH to my wife [*name*] the personal use and enjoyment in her residence for the time being so long as she shall continue my widow and shall reside in England of all my household furniture plate linen china glass books pictures prints musical instruments and other effects of a like nature which shall at my death be in or about my then dwelling-house (*gg*) And I direct my executors (other than my said wife) to deliver the same to her within one calendar month next after my death on

her signing an inventory thereof to be prepared and kept by my other executors who shall at the same time deliver to her a duplicate of such inventory signed by them And I empower my said other executors by writing under their hands to determine in case of dispute what articles shall be considered as included in the bequest lastly hereinbefore contained and I exonerate them from all responsibility in respect of the effects included in the same bequest after such delivery thereof as aforesaid until they shall receive actual notice that my wife is dead or has married again or is resident out of England.

—power to determine questions.

(*gg*) See note (*d*) to Prec. 5 and note (*a*) to Prec. 8.

I AUTHORISE my trustees to dispose by way of gift or otherwise [free of duty] to such persons and in such manner as they shall think fit of my wearing apparel and any other articles of personal or household use or ornament not exceeding £—— each in value which they may for any reason think it unadvisable to sell.

Power to trustees to give away articles of small value.

I DECLARE that it shall be lawful for my trustees to permit my wife to take at a valuation to be made in such manner as they shall think fit all or any part of the furniture plate linen china glass printed books pictures prints musical instruments and other effects of a like nature of which I shall die possessed and to accept such bond or promissory note of hand or other personal security for the payment of the amount of such valuation either with or without interest by such instalments and at such time or times and in such manner as they shall think fit without incurring any responsibility by reason thereof.

Furniture. Power to trustees to sell to wife, and to accept security for purchase-money.

I GIVE all my household furniture and all my plate linen pictures and books to my said trustees [*names*] UPON TRUST that my trustees shall permit my wife to have the personal use and enjoyment thereof during her life and after her death UPON TRUST that my trustees shall sell and convert the same into money and pay or divide the clear money arising therefrom to or amongst such of my children as shall be living at the death of my said wife and if more than one in equal shares PROVIDED nevertheless that if at the death of my said wife such of my children as shall be then living or the greater number of them shall have attained the age of twenty-one years and shall signify to my trustees the desire of such children or the greater number of them that my said furniture plate and other articles hereinbefore bequeathed shall not be sold but shall be divided *in specie*

Bequest of furniture, plate, &c., to trustees upon trust for wife for life—

to sell—and divide proceeds amongst children.

Proviso, allowing division *in specie*.

then the same shall be accordingly divided by my trustees into as many shares as there are children of mine living at the death of my said wife such shares to be as nearly of equal value as may be and such children shall have preference in the choice of shares according to priority of birth and all differences which shall arise respecting the division of such furniture and other articles shall be determined by my trustees whose decision shall be final And I DIRECT my trustees to take an inventory of my said furniture plate and other articles and deliver to my wife a copy thereof and to retain in their hands another copy.

Inventory.

Bequest to trustees of plate, &c., for unmarried children equally, with survivorship.

I BEQUEATH all my plate [&c.] unto the said —— and —— Upon trust to divide the same amongst such of my children as shall not at my death be or have been married in shares and proportions as nearly equal in value as may be such division to be made by my trustees according to the best of their judgment and if any of such children shall die under the age of twenty-one years then (*h*) the share or shares as well accruing as original of the child or children so dying shall belong to the others or other of such children to be divided between them if more than one in manner aforesaid.

Word "then."

(*h*) The word "*then*," as commonly interposed between two limitations, "is a particle of inference connecting the consequence with the premises, and meaning 'in that event,' or 'if that happens.' It is therefore, in those cases, a word of reasoning rather than of time," *per* Lord Brougham in *Campbell* v. *Harding*, 2 R. & My. at 411. But in *Gill* v. *Barrett*, 29 Be. 372, the word "*then*," used twice in the same sentence in a will, was construed in the first instance as pointing to the event, and in the second as an adverb of time. And see *Wharton* v. *Barker*, 4 K. & J. 483.

Specific legacies;

—time of delivery.

I BEQUEATH the specific legacies following namely To my wife all the wines liquors fuel housekeeping provisions and other consumable stores which shall at my death be in or about my then dwelling-house To my son [*name*] my gold watch with its appendages To &c. [*other specific legacies*] And I DIRECT the specific legacy hereinbefore bequeathed to my said wife to be delivered immediately after my death and the several other specific legacies hereinbefore bequeathed to be delivered within one calendar month after my death And I DIRECT the legacy duty on and all the expenses incident to the aforesaid bequests (as well specific as pecuniary) including all expenses of packing and remitting the same (*hh*) and annuities to be paid by my trustees and executors out of the moneys to arise from the sale and conversion of my residuary estate.

Legacy duty and expenses.

(*hh*) See 68 Sol. J., p. 750.

General direction that gifts shall be free of duty.

I DECLARE that all legacies and annuities bequeathed by this my will or any codicil hereto and all specific devises and specific bequests made by this my will or any codicil hereto shall be free from all duties payable in respect of my death whether legacy duty succession duty estate duty or other duty now in force or at any time before my death imposed (*i*) And I direct that such duties and also that all duties (if any) payable in respect of property of which I have disposed during the last three years of my life shall be paid out of my residuary estate.

(*i*) As to the inconvenience of providing for duties subsequently imposed, see *Re Stoddart*, [1916] 2 Ch. at p. 448, and cases cited *ante*, p. 214. As to estate duty on gifts *inter vivos* within three years before death, see Finance (1909—10) Act, 1910, s. 59.

Conditional bequest.

WHEREAS my son John owes me the sum of £—— on mortgage of —— &c. Now in case my said son John shall within eighteen calendar months from the day of my death assure the hereditaments comprised in the said mortgage upon the trusts for the purposes and subject to the powers and provisions of the settlement executed in contemplation of his marriage with his present wife concerning the real estate therein comprised or such of them as shall be then subsisting or capable of taking effect I DIRECT my executors to release the same hereditaments from the said sum of £—— and all interest and arrears of interest which may be owing thereon down to and including the day of the execution of the said assurance But if my said son shall for the said period of eighteen calendar months refuse neglect or omit to settle the said mortgaged hereditaments in manner aforesaid then I direct my executors to recover the said sum of £—— and the interest thereof or to foreclose the equity of redemption of the same hereditaments And if the said sum of £—— or any part thereof shall be recovered I direct my executors to invest the same in the purchase of freehold messuages or lands of inheritance in possession and to assure the hereditaments so purchased or foreclosed (as the case may be) upon the trusts for the purposes and subject to the powers and provisions of the said marriage settlement concerning the real estate therein comprised or such of them as shall be then subsisting or capable of taking effect.

Bequest to wife on condition that she gives a bond to executors to pay £—— within six months after her death.

I DECLARE that the bequests to my wife herein contained are given on condition that she shall within six calendar months after my death execute and give a bond under her hand and seal to the trustees or trustee for the time being of this my will in a sufficient penalty conditioned for the payment unto such obligees or obligee their or his executors administrators or assigns by the

executors or administrators of my wife within six calendar months after her death of the sum of £—— to be held upon the trusts herein declared or referred to of and concerning the same.

Legacy to debtor of debt secured by mortgage.

I GIVE to —— of &c. and if he shall die in my lifetime his representatives the sum of £—— which he owes me on mortgage of his Dale Estate in the county of W. and all interest and arrears of interest thereon down to and including the day of my death free of duty AND I direct that the term of years now vested in me to secure the said moneys shall merge and be extinguished in the freehold and inheritance of the said Dale Estate.

Legacy to debtor;

I GIVE to A. B. of &c. the debt of £—— which he owes me or so much thereof as shall be owing at my death (*k*) and all interest and arrears of interest thereon down to and including the day of my death [*or* and the interest thereon not exceeding one year's interest in case so much shall be owing at my death] free of duty and I DIRECT my executors to cancel and deliver to the said A. B. the bond by which the said sum of £—— and interest are secured AND in case the said A. B. shall die in my lifetime this bequest shall take effect in favour of the executors or administrators of the said A. B. for the benefit of his estate and my executors shall cancel and deliver the said bond to his executors or administrators.

—provision against lapse.

Legacy to debtor; release of debt.

(*k*) In *Eden* v. *Smyth*, 5 Ves. 341, a legatee was held entitled to his legacy discharged from debts owing by him to the testator upon evidence from the testator's accounts and unattested memoranda in his writing. But see *Chester* v. *Urwick*, 23 Be. 404, as to the effect of such memoranda in releasing a debt. And see *Re Tinline*, 56 S. J. 310. A person who owes money to an estate, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass, without first making the contribution which completes it; and the benefit taken by a defaulting trustee under a will can be retained to make good his default whether that benefit came to him by original or derivative title, *Re Dacre*, [1916] 1 Ch. 344; 85 L. J. Ch. 274. And see *Re Melton*, [1918] 1 Ch. 37; 87 L. J. Ch. 18. If the debt is barred by statute, still the principle applies, *Cherry* v. *Boultbee*, 4 My. & Cr. 442; 9 L. J. Ch. 118; explained in *Re Pink*, [1912] 1 Ch. 498; 2 Ch. 528; 81 L. J. Ch. 753; *Courtenay* v. *Williams*, 3 Ha. 539; 15 L. J. Ch. 204; *Re Akerman*, [1891] 3 Ch. 212; 61 L. J. Ch. 34. If the testator intends to forgive the statute-barred debts this should be made to appear clearly. As to the effect of a direction to bring debts into hotchpot, see *Re Barker*, [1918] 1 Ch. 128; 87 L. J. Ch. 166; *Re Clark*, [1924] W. N. 75. Legacy duty will be payable by a debtor unless the gift to him be free of duty, *Att.-Gen.* v. *Holbrook*, 3 Y. & J. 114. Unless the last proviso in the clause above be inserted, the death of the debtor before the testator would not have the effect of releasing the debt. Wms. Exors. 956.

Power to trustees to forgive debts.

I DECLARE that my trustees shall in their absolute and uncontrolled discretion and whether any debtor may appear able to pay or not be at liberty to exercise all or any of the powers conferred on trustees by section 15 of the Trustee Act 1925 and shall not be bound to enforce my strict rights in cases wherein they consider it probable that I should if alive have shown leniency or forgone payment (*kk*).

(*kk*) As to the meaning of "debts" in a clause forgiving debts, see *Re Neville*, [1925] 1 Ch. 44; 94 L. J. Ch. 130. For sect. 15 of the Trustee Act, 1925, see *ante*, p. 123.

Legacy of shares; directions as to calls.

I GIVE to —— of &c. the shares which may belong to me at the time of my death in the several companies mentioned in the schedule (*l*) to this my will I DECLARE that the dividends thereon accruing at the time of my death shall not be apportioned as between the said —— and my executors and that the said —— shall have the benefit of any calls paid by me in respect of the said shares in anticipation and that if any calls thereon shall be due and unpaid at the time of my death the same with all interest thereon shall be paid by my executors out of my general residuary estate I further declare that the said —— shall be liable to pay all calls falling due after the day of my death in respect of the said several shares and shall exonerate my estate therefrom.

Schedules.

(*l*) Schedules, as they relieve the body of the will from much matter which interferes with the continuity of the instrument, may often be adopted with advantage in the preparation of wills. But care should be taken that the signature of the testator is underneath or follows the schedules.

Stock legacy.

I GIVE to —— of &c. the sum of £—— Two Pounds Ten Shillings per Cent. Annuities now standing in my name in the books of the Governor and Company of the Bank of England And in case I shall not have any such stock or stock to that amount standing in my name at the time of my death I DIRECT my executors out of my personal estate to purchase in the name of the said [*legatee*] the sum of £—— like annuities or so much of the same annuities (as the case may be) as will make up that sum which I hereby give to the said [*legatee*].

Specific legacy; stock.

I GIVE to —— of &c. as a specific legacy the sum of £—— Two and Three-quarters per Cent. Annuities now standing in my name in the books of the Governor and Company of the Bank of England (*m*) together with any dividends thereon whether in arrear or accruing due at the time of my death.

Ademption.

(*m*) As to the liability of these legacies to ademption, and the consequent loss by the legatees of all benefit, see 2 Wms. Exors. 1061 *et seq.*

And for a clause providing against ademption, see Prec. 11, clause 34, *ante*, p. 195.

Shares.

I GIVE to —— of &c. as a specific legacy my twenty shares numbered 10—29 both inclusive in the —— Life Assurance Company (*n*) and I declare that the dividends thereon current at the time of my death shall not be apportioned but shall belong wholly to the said ——.

(*n*) See note (*m*) above.

Bonuses to be income.

I DECLARE that any bonus or bonuses which may from time to time be declared in respect of any shares or stock subject to the trusts of this my will shall be applied as and be deemed income arising from such shares or stock (*o*).

(*o*) See note (*a*) to Prec. 24.

Solicitor's books, drafts, and papers.

I GIVE to my son —— all my law books books of account and business draft papers and documents and the safes boxes cupboards and bookcases in which they shall be deposited at my death subject nevertheless as to the said business drafts papers and documents to the paramount right of any person or persons to order and direct the disposition thereof respectively.

Bequest of share in brewery.

I GIVE unto my said son —— all my share and interest in the brewery and premises situate at —— aforesaid carried on by him in his own name alone but in fact in partnership with me and in the plant (*p*) machinery fixtures utensils stock book-debts goodwill and effects connected therewith but this bequest is not to include any public-houses or other property separate and distinct from the said brewery though held by my said son and myself in connection therewith.

Plant. Goodwill.

(*p*) As to the word "plant," see *Wood* v. *Gaynon*, 1 Amb. 394; as to what is comprised in a bequest of "the plant and goodwill" of a business, *Blake* v. *Shaw*, Joh. 732. And see *Re Henton*, 30 W. R. 702. As to what is included in "all my share and interest" in the business of a solicitor, see *Re Barfield*, 84 L. T. 28.

Bequest of share in partnership concern.

I GIVE my share in the business of —— carried on by me in partnership with —— to my said trustees [*names*] UPON TRUST to continue and carry on the same until the determination of the partnership term by effluxion of time or otherwise and I DIRECT that the profits and proceeds of the said share shall be applied by my trustees as part of the annual income of my residuary personal estate and I FURTHER DIRECT that on the determination

of the said term by effluxion of time or otherwise my share in the said partnership property and effects and the goodwill thereof shall be assigned to my eldest son John in consideration that he shall thereupon pay to my trustees such a sum of money as shall then be the excess of the value thereof (to be ascertained as hereinafter mentioned) above the sum of £5,000 with interest on such excess at the rate of 5 per cent. per annum computed from the determination of the said term And I DIRECT that the value of my said share shall be determined by the award of three disinterested persons or of any two of them one of such persons to be chosen by my trustees other than my eldest son one other of them by my eldest son and the third by such two persons so chosen And that in determining such value nothing shall be charged for the goodwill of the said business And I direct that the sum of money to be paid by my eldest son as aforesaid shall be applicable as part of my residuary personal estate.

Valuation.

Goodwill.

I BEQUEATH the sum of £—— to my trustees on trust to invest the same and to pay the income of such investments to A. B. until he shall become a bankrupt or shall do or suffer any act or thing whereby the said annual income or his interest therein or any part thereof would or might but for this provision be charged or incumbered or become vested in (*q*) any other person persons or a corporation and I DIRECT that my trustees shall during the residue of the life of the said A. B. apply the said income for or towards the maintenance of such of the children of the said A. B. as shall from time to time be living. AND in case there shall not be any such child then I direct my trustees to apply the said income equally between C. D. E. F. and G. H. or such of them as shall be living and subject to the trusts aforesaid my trustees shall hold the said investment in trust for Y. Z. absolutely but so that my trustees shall not be responsible for paying the said income to the said A. B. after the happening of any such act or thing as aforesaid unless and until they shall have received express notice thereof.

Provision in case of bankruptcy of legatee.

(*q*) Where the words were "would become payable to or vested in some other person" it was held that on a receiving order being made against the legatee, though his income would not vest in the official receiver, still, as it would become payable to the latter if it had belonged absolutely to the legatee, the clause for cesser of the legatee's interest took effect, *Re Sartoris's Estate*, [1892] 1 Ch. 11; 61 L. J. Ch. 1; *Re Laye*, [1913] 1 Ch. 298; 82 L. J. Ch. 218. A receiver in lunacy is the statutory agent of the lunatic, so that an order in lunacy appointing a receiver, does not, where there are no special words in a forfeiture

clause, effect a forfeiture, *Re Marshall*, [1920] 1 Ch. 284; 89 L. J. Ch. 204.

For a form giving income on " protective trusts " under sect. 33 of the Trustee Act, 1925 (15 Geo. 5, c. 19), see Prec. 11, clause 25, and note thereto.

Trusts of pecuniary legacy;

—to invest;

—to pay income to niece for life; restrained from anticipation.

—subject as above,

—for children equally.

If no child, to form part of the residue.

I DIRECT my trustees to invest the said sum of £—— and to stand possessed of the said sum and the securities for the same (hereinafter referred to as the said trust fund) upon the trusts following namely UPON TRUST to pay the annual income arising therefrom unto my niece C. C. the wife of T. C. of &c. during her life for her separate use and without power of anticipation And after her death in case she shall by her will so direct Upon trust to pay the whole or any part of such annual income unto her present or any other husband whom she may leave surviving her during his life or for any shorter period And subject as aforesaid as to as well the capital as the annual income of the said trust fund UPON TRUST for all the children of my said niece who being sons or a son attain the age of twenty-one years or being daughters or a daughter attain that age or be married and if more than one in equal shares AND in case there shall not be any such child then I direct that the said trust fund or so much thereof as shall not have been applied under any statutory or other power shall form part of the residue of my estate.

Testamentary appointment of trust funds in execution of a power contained in a former will.

WHEREAS under the will of my late wife M. or otherwise I have in the event of there not being any child of mine by her living to acquire the absolute vested interest in certain trust-moneys or property comprised in the settlement made in contemplation of my marriage with her a power of disposing of such trust-moneys or property in such manner as I may think proper NOW I DO HEREBY in execution of all powers and authorities enabling me in this behalf appoint and bequeath all trust-moneys and funds over which I have or eventually may have by virtue of the same will or otherwise any power of appointment or disposition to the said [*trustees*] Upon the same or the like trusts and subject to the same or the like provisions and declarations as are hereinbefore expressed and declared concerning my residuary personal estate or as near thereto as may be.

Appointment to children.

IN EXERCISE of the power of appointment amongst my children (*r*) by my late wife Mary reserved to or vested in me by the settlement executed in contemplation of my marriage with her I hereby appoint and bequeath the sum of £—— comprised in the same settlement and the investments representing the same

to my four daughters Mary B. Jane B. Sarah B. and Elizabeth B. in equal shares (*s*).

(*r*) A power to appoint to children absolutely is well exercised by giving a child a life interest, with power to appoint by will only, *Slark* v. *Dakyns*, L. R. 10 Ch. 35; 44 L. J. Ch. 205, if such child was *in esse* at the time of the creation of the power.

(*s*) Every power of appointment was made an exclusive power unless the donor of the power prescribed a minimum share which each or any object was to have, by 37 & 38 Vict. c. 37, which applied to appointments made after July 30, 1874, though the power was created before the Act. The Act is repealed by the Law of Property Act, 1925 (15 Geo. 5, c. 20), and the provision is replaced by sect. 158 of that Act, which validates appointments where objects are excluded or take illusory shares.

Specific devise and bequest of freeholds and leaseholds;

Subject to a charge.

I DEVISE and bequeath ALL that my freehold estate situate &c. AND ALL that piece of land held by me for the residue of a term of ninety-nine years granted by the late —— and being part of a tract of land called —— (but subject as to —— acres part thereof to a lease dated &c. granted ——) (*t*) unto my trustees [*names*] but subject to and charged exclusively in exoneration of my other estate with the payment by my said eldest son of the sum of £—— and interest for the same at the rate of four per cent. per annum computed from my death the first payment thereof to be made on the expiration of six calendar months next after my death And I direct that in case my said eldest son his executors administrators or assigns shall pay such interest as last mentioned by equal half-yearly payments on or within thirty days next after the said half-yearly days respectively then and in such case my trustees shall not require payment of the said sum of £—— until the —— day of —— AND I DIRECT that the said sum of £—— and the interest thereof shall be applied by my trustees as part of my residuary personal estate AND subject to and charged with the said sum of £—— and the interest thereof I direct that the said freehold and leasehold premises shall be held by my trustees upon the trusts following that is to say UPON SUCH TRUSTS for such estates or interests and in such manner in all respects as my said eldest son shall by deed or will appoint so only that every such appointment be made in favour of some one or more of his children or other issue born in his lifetime And in default of and until such appointment UPON TRUST to pay the rents and annual proceeds thereof unto my said eldest son during his life And after his death as to the same freehold and leasehold premises respectively subject as aforesaid UPON TRUST for the child if only one of my said eldest son or if more than one child of my said eldest son upon trust to sell the same (*tt*) and divide the net proceeds

Upon trust for issue of son as he shall appoint;

—to son, for life;

—his children;

—hotchpot.

of such sale equally amongst such children of my said eldest son as being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be previously married but no child of my said eldest son in favour of whom or of any of whose issue an appointment shall be made under the power aforesaid shall participate under the trust last hereinbefore contained in the unappointed part of the said freehold and leasehold premises without bringing the benefit of such appointment into hotchpot AND in case there shall not be any child or other issue of my said eldest son who shall attain a vested interest under the powers or trusts aforesaid then I DIRECT that subject to the power for advancement the said freehold and leasehold premises shall go and be considered as part of my residuary estate and be held upon the trusts thereof.

Election bequest *cum onere.*

(*t*) Where a testator makes several bequests to a devisee, one of which is clogged with a burden created by the testator, it is a question of intention, to be gathered from the will, whether the devisee must elect to take all or none of the gifts, or whether he may accept the beneficial gifts, and repudiate the burdensome one. Thus, where A. bequeathed a legacy to B., devised freeholds to B. and his wife for life with remainder over, and after various intervening gifts bequeathed leaseholds to B., it was held that B. might accept the legacy and freeholds, and repudiate the burdensome bequest of the leaseholds, *Warren* v. *Rudall*, 1 J. & H. 1; 29 L. J. Ch. 543; *Long* v. *Kent*, 6 N. R. 354.

(*tt*) See sect. 34 of the Law of Property Act, 1925 (15 Geo. 5, c. 20).

Bequest of leaseholds and personalty to first son, &c., entitled to the possession of settled freehold estate.

I DEVISE and bequeath all my leases for lives of any lead or other mines or minerals and all contracts and agreements respecting any lead or other mines or minerals and all my personal estate not hereinbefore otherwise disposed of to my son or other descendant who shall first within the period of twenty-one years after my death be of the age of twenty-one years and entitled to the said hereditaments and premises comprised in the said settlement in remainder or reversion immediately expectant on the determination of the said term of 500 years.

Devise of real estate to trustees; to permit wife to occupy house during her widowhood;

I DEVISE all &c. —— unto —— of &c. in fee simple upon the trusts following (that is to say) UPON TRUST that my trustees shall permit my wife [*name*] if she shall continue my widow and such of my daughters as shall from time to time be spinsters to have the personal use occupation and enjoyment as long as they or any one or more of them shall think fit personally to dwell in the same (*u*) of the messuage or tenement now in the occupation of B. with the gig-house and room over the same together with the washhouse [&c.] and the garden behind the said messuage together with the free use of the pump and water

in the yard of my present dwelling-house and with liberty to pass and repass to and from the said messuage and premises the use and enjoyment whereof is hereinbefore given to them through over and along the yard of my said present dwelling-house to and from the public road or street now called —— street my said wife and daughters or such of them as shall so use occupy and enjoy the said premises maintaining and keeping the same during such their or her use occupation and enjoyment thereof in good tenantable repair and condition to the satisfaction of my trustees AND as to all the said hereditaments and premises hereinbefore devised subject and without prejudice as to part thereof to the trusts hereinbefore contained in favour of my said wife and daughters UPON TRUST that during the minority of my son W. B. my trustees shall let the same for any term or terms not exceeding —— years at the best yearly rent or rents and receive the rents issues and profits of the same hereditaments and premises and thereout in the first place pay and satisfy all the costs charges and expenses of insuring the same against loss or damage by fire and of maintaining and keeping the same in good tenantable repair and condition and all other incidental outgoings and expenses and in the next place apply such annual sum or sums as my trustees shall think expedient in or towards the maintenance and education or otherwise for the benefit of my said son W. B. in such manner as my trustees shall judge most beneficial and dispose of the residue or surplus (if any) of the same rents issues and profits as part of my residuary personal estate AND subject thereto UPON TRUST for my said son W. B. in fee simple.

—to let and manage, during the minority of son.

(*u*) A devise of the "use and occupation" of land does not usually necessitate personal use and occupation, but authorises a letting of the land, *Rabbeth* v. *Squire*, 4 De G. & J. 406; 28 L. J. Ch. 565. But the more limited construction may be required by the context, *Maclaren* v. *Stainton*, 27 L. J. Ch. 442; *Parker* v. *Parker*, 1 N. R. 508; but an option to occupy and enjoy, when exercised, gives to the person who exercises it the powers of a tenant for life under the Settled Land Act, *Re Anderson*, [1920] 1 Ch. 175; 89 L. J. Ch. 81; *Re Gibbons*, [1920] 1 Ch. 372; 89 L. J. Ch. 148.

Use and occupation.

Again, where a testator gave his pictures to trustees upon trust to permit a certain person to have the "use and enjoyment" thereof during her life, and that person had some of the pictures in a flat which she let furnished for a short time, it was held that she was entitled to let the pictures together with her flat, and was not restricted to personal enjoyment, *Re Williamson*, 94 L. T. 813.

To my eldest son [*name*] and every other son of mine and their respective issue male so that every elder son and his issue male be preferred to and take before every younger son and

Devise in strict settlement.

his issue male and that my grandsons respectively with their respective issue male take in succession and according to their respective seniorities and so that every such son and every such grandson who shall be begotten in my lifetime take an estate for his life without impeachment of waste with remainder to his first and every subsequent son successively according to seniority in tail male and that every such grandson who shall be begotten after my death take an estate in tail male (*x*).

(*x*) See note (*c*) to Prec. 28, *ante*, p. 333.

Limitation for life, remainder to the first and other sons of life-tenant in tail, remainder to his daughters as tenants in common in tail, with cross-remainders between them.

To A. B. and his assigns during his life without impeachment of waste And immediately after the death of the said A. B. or the determination in his lifetime of the estate hereinbefore limited to him To the first and every other son successively of the said A. B. in remainder one after another and the heirs of the body of each such son every elder son and the heirs of his body taking before every younger son and the heirs of his body And on failure of such issue To the daughter of the said A. B. if only one or if more than one to —— [*names of trustees*] upon trust to sell the same (*y*) and to hold the net proceeds of such sale in trust for all the daughters of the said A. B. in equal shares as tenants in common and the heirs of the body or respective bodies of such daughter or daughters And on failure of the issue of each of the said daughters in trust as to as well the share hereinbefore given to her as the share or shares to her next hereinafter given for the other if only one or the others if more than one of the said daughters and if more than one to take as aforesaid and the heirs of her or their body or respective bodies And on failure of such issue in trust for the said A. B.

(*y*) See sects. 34 (3) and 130 of the Law of Property Act, 1925 (15 Geo. 5, c. 20).

Limitation for life, remainder to the first and other sons of life-tenant born in testator's lifetime for life; remainder to such son's first and other sons in tail male; remainder to after-born sons in tail male; re-

To A. and his assigns during his life And from and after his death [*or* for the term of one hundred years to be computed from my death if he shall so long live (*z*) and immediately after the expiration or sooner determination of the same term] To the first son born in my lifetime of the said A. and the assigns of such son during his life And immediately after his death [*or* To the first son &c. and the assigns of such son during the term of one hundred years if he shall so long live and immediately after the expiration or sooner determination of the same term] To such son's first and every other son successively in remainder one after another and the heirs male of the body of each such last-mentioned first and every other son the elder and the heirs

male of his body taking before the younger and the heirs male of his body And on failure of such issue To the second and every subsequent son born in my lifetime of the said A. for the life of each such son [*or* for the term of one hundred years if such son shall so long live] with remainder To such son's first and every other son successively in tail male in manner hereinbefore expressed with respect to the said A.'s first son and his issue male every elder of such second and other sons and his issue male taking before every younger and his issue male And on failure of such issue To the first and every other son born after my death of the said A. and the heirs male of the body of each such son every elder son and the heirs male of his body taking before every younger son and the heirs male of his body AND on failure of such issue To the said A. and the heirs of his body AND on failure of such issue To the person who would have been my heir under the general law in force before 1926.

remainder to first tenant for life in tail; reversion to person who would have been testator's heir; [with variation substituting a term of years determinable on life for the life estate].

(*z*) See *Coape* v. *Arnold*, 4 D. M. & G. 574; 24 L. J. Ch. 673; and Jarm. Wills, 1862.

To A. and his assigns during his life AND immediately after his death To D. his wife and her assigns during her life AND immediately after her death To [*names of trustees*] UPON TRUST to sell the same and to hold the net proceeds of such sale in trust for all or any one or more exclusively of the children and (*a*) more remote issue (such issue coming into being in the lifetime of the said A. and D. or the survivor of them) for such interest or interests in such shares subject to such limitations and in such manner in all respects as the said A. and D. by any deed or deeds revocable or irrevocable or as the survivor of them by any deed or deeds revocable or irrevocable or by his or her will shall appoint AND in default of appointment and subject to any partial appointment in trust for the child or children if more than one of the said A. and D. as tenants in common in equal shares AND in case any of the said children shall die under the age of twenty-one years without leaving issue living at his or their death or respective deaths [*or* under the age of twenty-one years without having been married *or* being a son or sons under the age of twenty-one years or being a daughter or daughters under that age without having been married] then in trust as to as well the share hereinbefore given to each child so dying as the share or shares next hereinafter given to such child for the other or others if more than one of the said children in equal shares AND in case there shall not be any child of the said A. and D. or not any such child who shall attain the age of

Limitations to husband and wife, remainder on trust for sale for their children as they or the survivor shall appoint;

and in default of appointment for the children in common, with cross executory trusts;

with an ultimate trust for the

surviving parent.

twenty-one years or who dying under that age shall leave issue living at his or her death [*or* who shall attain the age of twenty-one years or be married *or* who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married] in trust for the survivor of the said A. and D.

Appointment.

Children *and* issue; children *or* issue.

(*a*) It will be observed that this power is in favour of "all or any one or more exclusively of the children and more remote issue"; the commoner form is in favour of "children or more remote issue." The question then arises whether the appointment must not be in favour of children only, or of remoter issue only; in other words, whether an appointment to both children and issue is valid. If the terms of the power were strictly and literally followed, such an appointment would not be valid, but see *Re Veale's Trusts*, 4 Ch. D. 61; 5 Ch. D. 622, and Jarm. Wills, 824. The language of the text prevents the occurrence of this question.

Rule in *Wild's Case*;

Where, before 1926, there was a devise to a person and his children or issue, and he had no issue at the time of the devise, such person took an estate tail. This is the rule in *Wild's Case*, 6 Rep. 16 b; see Tud. L. C. R. P. Where, however, there were children at the time of the devise, the parent and children took jointly. See *Clifford* v. *Koe*, 5 App. Cas. 447; *Re Clerke*, [1915] 2 Ch. 301; 84 L. J. Ch. 807.

—did not apply to personalty.

The rule in *Wild's Case* was not applicable to personalty, *Audsley* v. *Horn*, 1 D. F. & J. 226; 29 L. J. Ch. 201. See also *Re Jones*, [1910] 1 Ch. 167; 79 L. J. Ch. 34; Jarm. Wills, ch. 50; Hawkins, Constr. Wills, 243.

As regards wills taking effect after 1925, the rule in *Wild's Case* will not apply, Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 130, *ante*, p. 324.

Limitations to sons and daughters successively in fee simple.

To the first son of the said A. And if such son shall die under the age of twenty-one years without leaving issue living at his death To the second and every other son of the said A. according to the order of their respective births in a succession of executory limitations in fee simple so that the estate of each such son shall in the event of his death under the age of twenty-one years without leaving issue living at his death be divested and go over to his next brother (*b*) And if there shall not be any son of the said A. or not any such son who shall attain the age of twenty-one years or who dying under that age shall leave issue living at his death then To the first daughter of the said A. &c.

Restriction on executory limitations.

(*b*) If there are no trustees for the purposes of the Settled Land Act, 1925 (see sect. 26), the next form should be adapted. See sect. 134 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), which replaces sect. 10 of the Conveyancing Act, 1882, and see *ante*, sect. 29 of the Wills Act, and the note thereto, as to where, by issue attaining twenty-one, an executory limitation becomes incapable of taking effect.

Devise for one in fee, in case of

I DEVISE my real estate to [*names of trustees*] in trust for A. B. if he shall survive me in fee simple And if he shall die

in my lifetime leaving sons or a son who shall survive me then in trust for the first second and every subsequent son of A. B. successively according to seniority in fee simple so that in the event of the death of each son under the age of twenty-one years without leaving a son living at his death the same estate shall be in trust for his next brother Provided always that if any son of A. B. shall become entitled to my real estate under this devise he shall take it subject to and I hereby charge such real estate with the payment of £—— to each of the children of A. B. (other than the son becoming entitled as aforesaid) who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married under that age with the consent of her mother or guardian for the time being And if the said A. B. shall die in my lifetime and there shall not be any son of his who shall attain the age of twenty-one years then and in that case I devise my real estate in trust for C. D. or his son or sons in the same manner and charged in all respects as if the preceding devise and proviso were repeated at length with the name C. D. substituted throughout for A. B. And I appoint the said [*names of trustees*] trustees of the settlement hereby created for the purposes of the Settled Land Act, 1925.

death for sons successively in fee;

—charged with a sum for brothers and sisters.

For such estates and with and subject to such powers and provisions as under or by virtue of the said will of —— [*or* of an Indenture of settlement dated &c. and made between &c.] and all mesne assurances acts and operations of law shall at the time of my death be subsisting and capable of taking effect of and concerning the hereditaments comprised in the same will [*or* settlement] (*c*).

Devise by reference.

(*c*) Where property is devised or bequeathed on trusts by reference, it is usual to add words to the effect that charges or powers of charging are not thereby to be increased or multiplied. Cases may occur where such words would be necessary, see *Cooper* v. *Macdonald*, L. R. 16 Eq. 258; 42 L. J. Ch. 533; *Re Beaumont*, [1913] 1 Ch. 325; 82 L. J. Ch. 183; and compare *Re Campbell's Trusts*, [1922] 1 Ch. 551; 90 L. J. Ch. 433; *Re Arnell*, [1924] 1 Ch. 473; 93 L. J. Ch. 276. But trusts by reference are not, generally speaking, to be so read as to create a multiplication of charges, *Hindle* v. *Taylor*, 5 D. M. & G. 577; 25 L. J. Ch. 78; *Boyd* v. *Boyd*, 2 N. R. 486; *Trew* v. *The Perpetual Trustee Co.*, [1895] A. C. 264; 64 L. J. P. C. 49. A power to sell given by reference to a power to sell and give a receipt does not necessarily give power to receive purchase-money, *Cox* v. *Cox*, 1 K. & J. 251. For a case where the trusts by reference were in the event for the testator himself, see *Re Powell*, [1918] 1 Ch. 407; 87 L. J. Ch. 237.

Trusts by reference.

Multiplication of charges.

I DEVISE the advowson and perpetual right of presentation (*d*)

Advowson.

to the rectory of the parish church of —— in the county of —— Unto my son A. B.

Advowson.

(*d*) An advowson, or perpetual right of presentation to a parish church, is an incorporeal hereditament, and if not devised descended in the same mode as freeholds of inheritance. But where the vacancy occurred in the lifetime of the patron seised in fee, the next presentation being only a chattel interest went to his personal representative, *Mire-house* v. *Rennell*, 8 Bing. 490; unless the patron was also the incumbent, in which case the next presentation descended to his heir as part of the advowson, *Holt* v. *Bishop of Winchester*, 3 Lev. 47; unless he devise the presentation to another, as he might do, notwithstanding that the church became vacant by his death.

An advowson, as temporal property, was assets for payment of debts in the hands of the heir, *Westfaling* v. *Westfaling*, 3 Atk. 460. No estate duty is payable in respect of an advowson, *Att.-Gen.* v. *Peek*, [1913] 2 K. B. 487; 82 L. J. K. B. 767. An advowson appendant to a manor passed by a devise of the manor; but an advowson in gross did not pass by a devise of the testator's *lands* simply, though it passed by the words tenements and hereditaments, 3 Atk. 460. Advowsons in gross will pass under general words of devise—namely, "All other my real estate in the county of L."—notwithstanding that such words are not words of apt description, *Re Hodgson*, [1898] 2 Ch. 545; 67 L. J. Ch. 591. "Land" in the Law of Property Act, 1925 (15 Geo. 5, c. 20), includes an advowson (sect. 205 (1) (ix)). The Benefices Act, 1898 (61 & 62 Vict. c. 48), has imposed restrictions upon the sale of advowsons by public auction. Sect. 1, sub-sect. 2, of that Act enacts as follows:—

Sale of living, or next presentation.

"It shall not be lawful to offer for sale by public auction any right of patronage, save in the case of an advowson to be sold in conjunction with any manor, or with an estate in land of not less than one hundred acres situate in the parish in which the benefice is situate or in an adjoining parish and belonging to the same owner as the advowson, and any person who offers any right of patronage for sale by auction in contravention of this section, or who bids at any such sale, shall be liable on summary conviction to a fine not exceeding one hundred pounds."

This Act amends the law with regard to the sale and transfer of rights of patronage in other important respects.

The provisions of the Benefices Act, 1898, which is not always known, have been considerably affected by a Measure still less known. The Benefices Act, 1898 (Amendment) Measure, 1923 (14 & 15 Geo. 5, No. 1) prevents the sale of an advowson after two vacancies of the benefice (sect. 1), and renders void a proviso for redemption in a mortgage of an advowson (sect. 4).

Devise of lands contracted to be sold.

And whereas I have lately contracted to sell (*f*) to —— for the sum of £—— my freehold estate situate at —— I hereby devise the same estate (subject to the said contract) to A. B. And in case the said contract shall be carried into execution then I give to the said A. B. the said sum of £—— purchase-money which I or the executors of my will shall receive for the same And I direct that the costs incident to the said contract for sale

If sold, purchase-money instead.

whether the same be completed or not be borne by my residuary personal estate.

Devise of lands contracted to be sold.

(*f*) A devise by a testator of an estate which he "lately contracted to sell to M.," has been held to be a devise of the legal estate merely to enable the devisee to carry out the contract, but not so as to entitle the devisee to the purchase-money, *Knollys* v. *Shepherd*, cited 1 J. & W. 499, affirmed in D. P. Sugd. Law of Property, 223. It is conceived, however, that if the purchase had not been completed, the devisee in the above case would have been entitled to the land. As to lands specifically devised and subsequently sold, see note to sect. 23, *ante*, p. 47. And as to lands contracted to be sold passing under a devise of trust estates, when the testator died before completion, see *Lysaght* v. *Edwards*, 2 Ch. D. 499; 45 L. J. Ch. 554.

Under sect. 2 (2) of the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), which replaces sect. 12 (1) of the Conveyancing Act, 1911, the executor or executors to whom probate has at any time been granted can convey real estate without the concurrence of executors to whom power to prove has been reserved.

Gift of money in lieu of estate, if sold.

I DEVISE all &c. [*trusts*] PROVIDED ALWAYS that if at the time of my death I shall have sold and conveyed the said estate or any part thereof my trustees shall invest the sum of £—— or a proportionate part thereof to be fixed by them in their discretion upon trusts corresponding as nearly as may be with the trusts hereinbefore declared concerning the said estate.

Contract to purchase.

Discretion in trustees to complete.

AND WHEREAS I have contracted with —— of —— for the purchase of certain freehold hereditaments at —— I hereby authorise my trustees to complete such purchase or to relinquish the same as circumstances may require and as they in their discretion may think best AND I authorise my trustees to accept such a title (whether strictly marketable or not) to the said hereditaments as they shall deem it prudent to accept and if they shall think fit to waive any objections and requisitions and to dispense with any inquiries and evidence which they may be entitled (and but for this authority would be bound) to insist on make or require.

Devise of estate contracted to be purchased.

I DEVISE unto A. B. of —— the freehold estate situate at —— which I have contracted to purchase for the sum of £ —— from Mr. —— of —— which sum if unpaid at my death is to be paid out of my personalty in exoneration of the said estate And in case a good title to the said estate cannot be made I direct my executors to invest the sum of £—— in the purchase of freehold or leasehold hereditaments in such part of England as the said A. B. shall choose and by writing under his hand direct AND I DIRECT that upon payment by my executors of

the said sum of £—— such hereditaments shall be conveyed and assured unto the said A. B. according to the tenure thereof in lieu of the estate which I have contracted to purchase as aforesaid.

Right of pre-emption to several sons successively.

I DIRECT that my sons successively and according to their respective seniorities shall have the option of purchasing in one lot the real and leasehold estates belonging to me at the time of my death situate in the parish of —— at a valuation to be made by two competent valuers to be appointed by my trustees or if such valuers shall disagree by a third valuer to be appointed in writing by the two first-named valuers before entering upon the valuation as their umpire such option to be declared by notice in writing delivered to my trustees or any one of them or left at their or one of their usual or last known places or place of abode by my eldest son within one calendar month next after my death and by my other sons respectively within one calendar month next after the time when the period allowed to the person next preceding him in seniority shall have expired or such person shall have declared in writing his intention not to purchase the same real and leasehold estates but no purchaser under the trusts of this my will shall be obliged to take notice of or be affected by this power of pre-emption.

Power for son who is a trustee to purchase real or personal estate.

I AUTHORISE my said son A. notwithstanding his being a trustee of this my will to purchase any part or parts of my real or personal estate hereinbefore devised and bequeathed in trust as aforesaid at any sale or sales thereof by public auction or by private contract provided in the latter case that the sale shall be conducted by the trustees or trustee of my will other than the said A. or be made at a price fixed by a valuer appointed by such other trustees or trustee.

Devise of two messuages to trustees to offer one to testator's first and second sons and the other to the same sons, reversing their order, in succession, and if they decline, then, to sell.

I DEVISE all that piece of ground situate &c. and all those two messuages &c. thereon UNTO the said [*trustees*] in fee simple UPON TRUST that my trustees shall as soon as conveniently may be after my death offer to my eldest son [*name*] and my second son [*name*] successively the option of becoming the purchaser of the easternmost of the said two messuages and the ground thereto belonging at the price of £—— and offer to my said second and eldest sons successively the option of becoming the purchaser of the other of the same two messuages and the ground thereto belonging at the price of £—— and allow to each of my said sons the space of two calendar months from the time of making such offer to him for

determining whether he will accept or refuse the same And in case my said sons or either of them shall accept such offer of the same messuages or either of them within the space aforesaid then on payment to my trustees of the purchase-money for the same my trustees shall convey and assure the same unto such son or sons respectively But if the same messuages or either of them shall not be purchased by my said sons or one of them pursuant to the trust last aforesaid Then upon trust that my trustees shall sell and absolutely dispose of the said messuages or such of them as shall not be so purchased with the ground and appurtenances thereunto belonging And I declare that my trustees shall stand possessed of the net moneys to arise from the sale of the said messuages and premises whether purchased by my said sons or either of them or by any other person or persons upon the trusts hereinafter expressed and contained concerning the moneys to arise from my residuary personal estate.

General gift of real and leasehold estates to son, subject to debts and legacies, and to a prior life estate in part.

And as to my freehold messuages lands tenements and hereditaments specified in the second schedule (*g*) hereto And also as to my messuages lands tenements and hereditaments specified in the third schedule hereto And all other the property real and personal not hereinbefore specifically disposed of whereof I shall be possessed or have power to dispose at the time of my death (subject to the payment of my debts and funeral and testamentary expenses and the pecuniary legacies hereinbefore bequeathed and including after my wife's death the freehold hereditaments specified in the first schedule hereto) I give devise appoint and bequeath the same unto my said son [*name*] absolutely And I declare that all sales leases exchanges mortgages charges contracts and other dealings whatsoever to be made created entered into or transacted by my said son his executors administrators or assigns for valuable consideration of or upon or in respect of my residuary real property or any part or parts thereof shall as against my creditors and pecuniary legatees and for the protection and exoneration of purchasers and other parties to such sales or other dealings take effect as paramount and precedent to the charges in favour of such creditors and legatees created by my will and be of the same force as if such charges were omitted from my will [yet so that as to the freehold hereditaments specified in the first schedule hereto such sales or other dealings be during the life of my wife made created or entered into with her concurrence] and this declaratory clause shall not exclude prejudice or affect any protection or exoneration to which such purchasers

Special declaration as to power of devisee to sell and manage notwithstanding the charges.

or other parties would be entitled under the rules or doctrines of equity.

(*g*) See note (*l*), *ante*, p. 367.

Real estate and residue of personal estate;

I DEVISE unto my said trustees [*names*] in fee simple all the real estate and bequeath to them the residue of the personal estate of or to which I shall be seised possessed or entitled at my death upon the trusts and subject to the declarations following namely UPON TRUST that my trustees shall sell and convert into money my said estates or such parts thereof as shall be of a saleable or convertible nature and get in the other parts thereof WITH full discretionary power as to the time or mode of payment of the purchase-money or indemnity against or apportionment of incumbrances or as to any other matters relating to the sale as my trustees shall judge expedient And generally to effect the sale and conversion of my said estates on such terms and in such manner as they shall deem most advantageous ALSO full discretionary power to suspend (*h*) for such period as my trustees shall judge expedient [*or* so long as my said wife shall continue my widow or as any child of mine being a son shall be under the age of twenty-one years or being a daughter shall be under that age not having been married] the sale conversion or getting in of my said estates or any part or parts thereof respectively [*or* of such part or parts of my said estates as shall yield present income *or* of my said real estate or any part or parts thereof and of such part or parts of my personal estate as shall consist of investments in or upon any stocks funds shares or securities British or foreign real or personal yielding or not yielding present income] ALSO full discretionary power during the suspense of the sale conversion or getting in of the said estates respectively to manage and order all the affairs thereof as regards letting occupation cultivation repairs insurance against fire receipt of rents indulgences and allowances to tenants and all other matters but so that no lease shall be granted otherwise than from year to year or for a term not exceeding twenty-one years in possession at the most improved rent without fine or premium ALSO full discretionary power to employ receivers bailiffs accountants agents and others in or about the affairs of my said estates with such salaries or remunerations as my trustees shall think reasonable AND I DECLARE that for the purposes of enjoyment and transmission under the trusts hereinafter contained my said estates shall be considered as money from the time of my death and the rents dividends interest and other yearly produce thereof respectively to accrue due after my death and until the actual sale conversion

—sale and conversion.

—discretionary power to postpone conversion;

—interim management;

—constructive conversion from death;

rents, &c., to be deemed income.

and getting in thereof shall as well during the first year after my death as in subsequent years be deemed the annual income thereof applicable as such for the purposes of the said trusts without regard to the amount of such income or to the nature of the investments yielding the same AND as to the moneys to arise from the sale conversion and getting in of my said estates UPON TRUST that my trustees shall thereout in the first place pay or retain all the expenses incident to the execution of the preceding trusts and powers and my debts and funeral and testamentary expenses (*i*) and in the next place pay the pecuniary legacies hereinbefore bequeathed and appropriate the funds hereinbefore directed to be appropriated for answering the annuities hereinbefore bequeathed and in the meantime to pay the same annuities AND upon further trust invest the ultimate surplus of the said trust moneys in the names of my trustees in any of the modes of investment hereby authorised and from time to time with the consent in writing of my wife until she shall die or marry and afterwards in the discretion of my trustees vary the investment or investments of the said trust moneys for any other or others of the description contemplated by this trust AND UPON FURTHER TRUST that my trustees shall permit and empower my said wife to receive the annual income of the said moneys or of the stocks funds and securities whereon the same shall be invested as aforesaid (which moneys stocks funds and securities are hereinafter referred to under the denomination of "the said trust fund") during her life if she shall so long continue my widow she thereout maintaining educating and bringing up in a manner suitable to their station in life such of my sons as shall for the time being be under the age of twenty-one years and such of my daughters as shall for the time being be under that age not having been married AND immediately after her death or future marriage shall hold as well the capital as the annual income of the said trust fund IN TRUST for my child if only one or all my children if more than one who either before or after the death or future marriage of my wife shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married and if more than one in equal shares BUT I declare that if such child or children or any of them shall be a daughter or daughters then [one-half of] the said trust fund or [of] the share thereof to which such daughter or each of such daughters shall become entitled shall be held by my trustees upon the trusts following namely UPON TRUST with the consent in writing of my daughter entitled thereto and after her death in the discretion of my trustees to convert the same into money

Trusts of proceeds;

—expenses, debts, legacies, and annuities;

—investment of ultimate surplus;

—income to wife during her widowhood;

—charged with maintenance, &c., of children;

—capital to children equally.

Settlement of the shares of daughters;

—investment;

and invest the moneys to arise therefrom in or upon any of such securities as (and not any other than) are hereby authorised and from time to time with the like consent or in the like discretion to vary the investment or investments for any other or others of the same description And upon further trust to pay the annual income of the said moneys or the securities whereon the same shall be invested as last aforesaid (which moneys and securities are hereinafter referred to under the denomination of "the said settled fund") as and when the same shall from time to time become actually receivable into the proper hands of my same daughter for her separate use without power of anticipation as a strictly personal and inalienable provision during her life unless and until she being discovert shall do or suffer any act matter or thing whereby notwithstanding the restriction on anticipation hereinbefore imposed the same income or any part thereof shall either voluntarily or involuntarily be aliened or incumbered But if she being discovert shall do or suffer any such act matter or thing as aforesaid then immediately after the doing or suffering thereof as to the annual income of the said settled fund to accrue during the remainder of her life Upon trust to pay or apply the same in such manner as the same would by virtue of the trusts hereinafter contained be payable or applicable if my same daughter were actually dead And immediately after the death of my same daughter as to as well the capital of the said settled fund as the annual income thenceforth to accrue due for the same In trust for all or any one or more exclusively of the children and remoter issue of my same daughter (such remoter issue being born in her lifetime) in such proportions for such interests and generally in such manner as she shall from time to time by deed with or without power of revocation and new appointment or by will or codicil appoint But no child in whose favour or in favour of any of whose issue an appointment shall be made shall participate under the trust next hereinafter contained in the unappointed portion of the said settled fund without bringing the benefit of such appointment into hotchpot (*k*) And in default of appointment and subject to any partial appointment In trust for the child if only one or all the children if more than one of my same daughter who either before or after her death shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married such children if more than one to take in equal shares And if there shall not be any child of my same daughter who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married

—inalienable life interest;

—children and other issue of daughter, as she shall appoint;

hotchpot;

—in default, for children equally;

—if no child,

then IN TRUST for such persons for such interests and generally in such manner in all respects as my same daughter shall by will or codicil appoint AND in default of appointment and subject to any partial appointment IN TRUST for such person or persons as would by law have become entitled thereto at the death of my same daughter had she been absolutely entitled thereto and died intestate a spinster and domiciled in England such persons if more than one to take the shares and interests which they would have taken by law AND I EMPOWER my same daughter (notwithstanding the trusts herein contained subsequently to the trust in her own favour) by deed executed either after or in contemplation of her marriage or by will to appoint the annual income to accrue due after her death of the said settled fund or any part of such income to and for the life of any husband (*l*) of my same daughter who shall survive her I DECLARE that if any son or daughter of mine shall die in my lifetime and any child or children of such son or daughter shall be living at my death then the said trust fund or the share thereof to which the son or each son so dying would if living at my death and if then of the age of twenty-one years or to which the daughter or each daughter so dying would if living at my death have been entitled under the trusts aforesaid shall be held by my trustees upon such trusts and subject to such provisions in favour of the child or children of such son or daughter respectively as the same would have been held if as regards a son so dying such son were a daughter and had died immediately after my death or as regards a daughter so dying such daughter had died immediately after my death AND in case no child or other issue of mine shall acquire an absolutely vested interest in the said trust fund by virtue of my will then as to the same trust fund IN TRUST for such persons for such interests and generally in such manner as my said wife she continuing my widow at her death shall by will or codicil appoint AND in default of such appointment and subject to any partial appointment IN TRUST for such person or persons as would by law have become entitled thereto had I died immediately after the death or next marriage of my said wife intestate and domiciled in England such persons if more than one to take the shares and interests which they would have taken by law.

—as daughter shall by will appoint;

—daughter's next of kin.

Daughter empowered to appoint a life-interest to a husband.

Substitution of grandchildren for children of testator predeceasing him.

On failure of previous trusts;

—as testator's wife shall by will appoint;

—for testator's next of kin.

(*h*) In a trust for sale "so soon as convenient" after the testator's death, the trustees refused an offer of £900, and the estate remained unsold for twenty-three years: the trustees were held liable for the difference between £900 and the produce of the actual sale, *Fry* v. *Fry*, 27 Be. 144; 28 L. J. Ch. 591. See sect. 25 of the Law of Property Act, 1925.

Postponement of sale.

Trustees' liability.

(*i*) Testamentary expenses include the costs of an action for administration of the testator's estate, *Miles* v. *Harrison*, L. R. 9 Ch. 316; 43

Testamentary and

funeral expenses.

L. J. Ch. 585; *Harloe* v. *Harloe*, L. R. 20 Eq. 471; 44 L. J. Ch. 512; *Sharp* v. *Lush*, 10 Ch. D. 468; 48 L. J. Ch. 231; *Penny* v. *Penny*, 11 Ch. D. 440; 48 L. J. Ch. 691. But costs occasioned by administration of realty are borne by the real estate, *Re Betts*, [1907] 2 Ch. 149; 76 L. J. Ch. 463. Estate duty on realty is not, but estate duty on personalty passing to the executor as such is, a testamentary expense. A fund appointed under a general power does not pass to the executor as such, and it must bear its own duty, *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231; 85 L. J. Ch. 386; overruling *Re Hadley*, [1909] 1 Ch. 20; 78 L. J. Ch. 254. See also *Porte* v. *Williams*, [1911] 1 Ch. 188; 80 L. J. Ch. 127; *Re Hudson*, [1911] 1 Ch. 206; 80 L. J. Ch. 129.

As to funeral expenses, see Wms. Exors. 737; and *Goldstein* v. *Salvation Army Assurance Society*, [1917] 2 K. B. 291; 86 L. J. K. B. 793.

Hotchpot.

(*k*) As to hotchpot see *Re Cosier*, [1897] 1 Ch. 325; 66 L. J. Ch. 236; *sub nom. Wheeler* v. *Humphreys*, [1898] A. C. 506; 67 L. J. Ch. 499; *Re Gilbert*, [1908] W. N. 63; *Re Willoughby*, [1911] 2 Ch. 581; 80 L. J. Ch. 562; *Re Cavendish*, [1912] 1 Ch. 794; 81 L. J. Ch. 400; *Re (Marke) Wood*, [1913] 1 Ch. 303; 2 Ch. 574; 82 L. J. Ch. 203; *Re Fraser*, [1913] 2 Ch. 224; 82 L. J. Ch. 406; *Re Tod*, [1916] 1 Ch. 567; 85 L. J. Ch. 668; *Re Cooke*, [1916] 1 Ch. 480; 85 L. J. Ch. 452. Life and reversionary interests must be valued, and the value brought into hotchpot under the usual hotchpot clause, *Eales* v. *Drake*, 1 Ch. D. 217; 45 L. J. Ch. 51. As to the absence of a hotchpot clause, see *Re Bacon's Settlement Trusts*, 42 Ch. D. 559; 58 L. J. Ch. 823. And as to the date at which the value of stocks to be brought into hotchpot should be ascertained, see *Re Crocker*, [1916] 1 Ch. 25; 85 L. J. Ch. 179.

(*l*) As to the effect of divorce on the object of this power, see *Re Morrieson*, 40 Ch. D. 30.

Residuary devise and bequest.

I DEVISE and bequeath all hereditaments whatsoever of or to which I shall be seised or entitled at my death not otherwise herein disposed of And also all leasehold tenements sums of money and other personal estate to which I shall be entitled at my death not otherwise therein disposed of (all which are together hereinafter referred to as the said residuary trust premises) unto my said trustees [*names*] UPON TRUST that my trustees by and out of the rents interest and other annual proceeds thereof or by exercising the powers to sell and mortgage hereinafter contained or either of them as my trustees shall in their absolute discretion think proper shall pay my funeral and testamentary expenses and my debts and the legacies hereinbefore given and any other legacies I shall hereafter bequeath free from legacy duty and without deduction and pay such sums of money as my trustees shall think proper to expend in altering or improving any of the said residuary trust premises or in completing any messuage or other building on the said trust premises that shall be in course of erection at the time of my death and all succession legacy and estate duties that shall be payable by reason or in consequence of any devise or bequest herein contained and all costs charges and expenses

Upon trust;

—to pay debts, &c.;

—to repair and complete buildings;

—to pay succession and legacy duties, and costs;

that my trustees shall incur in carrying into effect any of the trusts or purposes of this my will so far as the same relate to or comprise the said residuary trust premises And subject and without prejudice to the trusts aforesaid Upon trust that my trustees shall pay unto my wife an annuity of £—— during her life but in case she shall marry again then the said annuity of £—— shall be reduced to an annuity of £—— and shall be for her separate use and without power to anticipate the growing payments thereof And I direct that the said annuity of £—— or £—— as the case may require shall be paid by equal quarterly payments the first payment of the said annuity of £—— to be made on the expiration of three calendar months next after my death and the first payment of the said annuity of £—— to be made on the expiration of three calendar months next after the marriage of my widow if she shall be living at the respective periods aforesaid And as to the said residuary trust premises subject and without prejudice to the trusts aforesaid my trustees shall hold the same Upon trust to sell and convert into money the same or such parts thereof as shall be of a saleable or convertible nature and get in the other parts thereof and invest the net moneys arising from the sale and conversion of or forming part of the same and stand possessed of the said trust premises upon trust for my child if only one or all my children if more than one who either before or after my death being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be previously married with the consent of her or their guardians for the time being and if more than one as tenants in common but not in equal shares it being my intention that the share of each of my sons who shall attain a vested interest under the trust last aforesaid shall be to the share of each of my daughters who shall attain a vested interest under the same trust in the proportion of three to two I empower my trustees if they in their absolute discretion shall think proper to postpone the ultimate division of the said residuary trust premises until the —— day of —— 19— [*or* for any term not exceeding twenty-one years from my death].

—to pay wife annuity of £ —;

—reducible to £—— on marriage;

—to be paid quarterly;

—subject as aforesaid;

—upon trust for children of testator;

—in unequal shares.

Discretion to postpone division.

I direct that all my plate pictures books and furniture which at the time of my death shall be in or about my house at —— shall be held as heirlooms and be held with my said house by the person or persons who under the limitations hereinbefore contained shall for the time being be entitled to the same (*m*) and for that purpose I exempt the said plate pictures books and furniture from the payment of my debts and legacies (*n*).

Heirlooms;

—exonerated from testator's debts.

(*m*) Where there was a gift to a person and his successors to be

Heirlooms.

enjoyed with and go with the title in the nature of heirlooms, this was, before 1926, construed as a direct, and not an executory, gift to the first person having the title, and he took absolutely, *Rowland* v. *Morgan*, 2 Ph. 764; 18 L. J. Ch. 78; *Re Johnston*, 26 Ch. D. 538; 53 L. J. Ch. 645. And even if the gift was qualified by any such expression as "so far as the rules of law or equity permit," this did not make the gift executory or avoid the rule against perpetuities, *Tollemache* v. *Earl of Coventry*, 2 Cl. & F. 611; *Re Viscount Exmouth*, 23 Ch. D. 158; 52 L. J. Ch. 420; *Re Hill*, [1902] 1 Ch. 807; 71 L. J. Ch. 417; *Portman* v. *Viscount Portman*, [1922] 2 A. C. 473. But where it clearly appeared that the testator's gift was intended to be executory, the Court would model the gift so as to carry into effect as far as possible the testator's wishes, *Sackville-West* v. *Viscount Holmesdale*, L. R. 4 H. L. 543; 39 L. J. Ch. 505. Thus where there was a gift in these terms, "As to all the household furniture, paintings . . . and the whole contents of my said house . . . I bequeath the same to my trustees . . . upon trust that they shall select . . . a collection of the best for the said Earl of Essex and his successors to be held and settled as heirlooms and go with the title," this was held to be a direction to settle the furniture, &c., and to give the first holder of the title only a life interest. But a gift of plate, and also of a leasehold house to the sixth Earl of Essex and "to his successors and to be enjoyed with and to go with the title" was held to be a direct executed gift which the Court could not model, and that the sixth Earl took absolutely, *Re Johnston*, 26 Ch. D. 538; 53 L. J. Ch. 645. See Jarm. Wills, 692 *et seq.*; *Re Beresford-Hope*, [1917] 1 Ch. 287; 86 L. J. Ch. 182. Now by virtue of sect. 130 (3) of the Law of Property Act, 1925 (15 Geo. 5, c. 20), an entailed interest can be created in personalty. See *ante*, note (*i*) to Prec. 28.

Legacy duty on plate, &c.

(*n*) Legacy duty is not payable on plate or other articles not yielding income bequeathed to persons in succession, until the articles are either sold, or devolve upon some person having power to sell, or an absolute interest therein (36 Geo. 3, c. 52, s. 14).

Chattels in strict settlement as heirlooms, where there is no real estate.

I GIVE all the plate library of books book-cases manuscripts framed and unframed pictures paintings drawings prints engravings bronzes medals sculptures and statuary (*p*) of which I shall die possessed to my trustees UPON TRUST during the life of my wife to permit the same to be enjoyed by her AND from and after her death as heirlooms UPON the following trusts (this is to say) upon trust for my eldest son during his life with remainder for his first and other sons successively according to priority of birth in tail male WITH remainder on like trusts in favour of my second and every other son successively according to priority of birth and their respective first and other sons successively for life and in tail male respectively WITH remainder in trust for the first and other sons of my first son successively according to priority of birth in tail WITH remainder in trust for the first and other sons successively according to priority of birth of my second and other sons successively as aforesaid in tail WITH remainder in trust for

the daughter or daughters of my first son in tail and if more than one as tenants in common with cross-remainders in tail between them (*q*) With remainder on like trusts in tail in favour of the daughter or daughters of my second and other sons successively as aforesaid With remainder in trust for my first and other sons successively according to priority of birth in tail With remainder in trust for my daughter or daughters in tail and if more than one as tenants in common with cross-remainders in tail between them With remainder on trust to sell the same and pay the net proceeds of such sale to the person or persons who at the time of the failure or determination of the preceding trusts would be entitled to my residuary estate if at that time I had died intestate and for the shares and interests and in manner provided by the Administration of Estates Act 1925 (*qq*).

(*p*) See note (*a*) to Prec. 8.

(*q*) See sect. 34 of the Law of Property Act, 1925.

(*qq*) See sect. 130 of the Law of Property Act, 1925 (15 Geo. 5, c. 20); and as to a sale of heirlooms by a tenant for life, see sect. 67 of the Settled Land Act, 1925 (15 Geo. 5, c. 18).

Power to trustees to give heirlooms to tenant for life.

I EMPOWER my trustees in their absolute discretion at any time or times within twenty-one years after my death to give any of the said articles and effects hereby settled which they may consider not suitable to be kept or enjoyed as heirlooms to any person of full age for the time being entitled under this my will to the actual possession or receipt of the rents and profits of the settled hereditaments for his or her absolute benefit.

Trust for children and for the issue *per stirpes* of such children by substitution.

AND (subject as aforesaid) as to the capital and income of the said trust fund UPON TRUST for such of my children living at my death and such of the issue then living of any child or children of mine dying in my lifetime as either before or after my death shall being males attain the age of twenty-one years or being females attain that age or be married under that age such children and other issue to take as tenants in common in a course of distribution according to the stocks the issue of a deceased child of mine taking by substitution as tenants in common the share only which their parent would have taken had such parent survived me and attained a vested interest.

Trust of residuary personal estate, or accumulated specific fund.

UPON TRUST for the absolute use and benefit of the first person being of the age of twenty-one years who shall by virtue of my will become entitled whether as tenant for life or as tenant in tail [male] by purchase to the actual possession or to the receipt of the rents and profits of my settled estate [*or* the hereditaments hereinbefore devised in strict settlement].

Name and arms clause.

PROVIDED ALWAYS and I hereby direct and declare that the said James C. shall within six calendar months next after my death and his having actually entered into and taken possession of the said freehold manors hereditaments and premises and the said leasehold premises hereinbefore described to be situate in the county of D. or either of them or any part thereof respectively take upon himself the surname of S. only and shall thenceforth style and write himself in all letters deeds and instruments and upon all occasions whatsoever by that surname alone And shall also assume use and bear the arms of S. as the same are now used and borne by —— (*r*) AND if the said James C. shall refuse or fail to assume use and bear such surname and arms within the period hereinbefore limited for that purpose or if the said James C. after having assumed used or borne the said surname and arms shall afterwards discontinue to bear and use the said surname and arms or any or either of them for the space of six calendar months THEN and in any such case the estate and interest hereby devised and bequeathed to the said James C. in the said freehold and leasehold premises shall cease AND the said freehold and leasehold premises shall thereupon go to and become vested in the said John C. but upon and subject to a condition or proviso similar as far as circumstances will permit to that which is hereby attached to the last-mentioned devise and bequest in favour of the said James C. AND if the said John C. shall also refuse or fail to assume use and bear such surname and arms within the period by the last-mentioned condition or proviso limited for that purpose or if the said John C. after having assumed used or borne the said surname and arms shall afterwards discontinue to bear and use the said surname and arms any or either of them for the space of six calendar months then and in any such case I DIRECT and declare that the said freehold and leasehold premises shall go to and become vested in my nephew William C. for his own absolute use and benefit.

Gift over in default of compliance.

Name and arms clause.

(*r*) See note (*h*) to Prec. 28, at p. 333, *ante*; and compare clause 11 in that Prec.

Clause imposing condition of religion (*rr*).

(1) I HEREBY DIRECT AND DECLARE that every devise and bequest other than specific [and other than the appointment hereinbefore made under my said marriage settlement made by this my will] to or in trust for or for the benefit of any child or issue of mine is made upon the condition that the person benefiting thereby is a [Roman Catholic] and accordingly I declare that if at the time at which any child or issue of mine born in my lifetime would become entitled to any benefit

under this my will my trustees shall not be satisfied that he or she professes the [Roman Catholic] faith or being an infant professes the same by the time at which he or she attains the age of twenty-one (*s*) and in the case of a life interest if before the expiration of twenty-one years from the death of the survivor of my children my trustees shall not be satisfied that any child or issue of mine who would otherwise be entitled to any benefit under this my will still professes the [Roman Catholic] faith then and in every such case such child or issue shall absolutely forfeit and lose (*t*) all share and participation in any right or power over the principal and income of the property to which otherwise such child or issue would become and be entitled And I DECLARE that every interest so forfeited shall go and devolve in manner following that is to say If the same shall be a life interest the income of any part thereof shall during the continuance of the life or during any less time in the uncontrolled discretion of my trustees be applied as the same shall become payable and without anticipation for or towards the maintenance and personal support or otherwise for the benefit of such issue of mine including any issue of the person who but for the forfeiture would have been entitled thereto as shall profess the Roman Catholic faith and any one or more of such persons to the exclusion of the others or other of them as my trustees shall in their discretion think fit But if the interest forfeited shall be a reversionary or expectant interest then such interest shall after the forfeiture go and devolve as if the person incurring the forfeiture had died in my lifetime and not as if the death of such person had happened immediately after my death.

(2) The question as to whether any child or issue of mine professes or ceases to profess the [Roman Catholic] faith shall be decided by my trustees and their decision shall be final and they shall not be liable or responsible for paying any income or paying or transferring any capital fund or sum or share to any person after a forfeiture unless and until my trustees shall have received express notice of the circumstances act or event causing such forfeiture before making such payment or transfer.

(*rr*) Testators sometimes desire to impose conditions as to the religious faith of beneficiaries. That such conditions are to be deprecated cannot be too strongly asserted, but a testator will sometimes insist upon their being inserted. See note (*h*) to Prec. 28, *ante*, p. 333.

(*s*) See *Re May*, [1917] 2 Ch. 126; 86 L. J. Ch. 698.

(*t*) See *Hodgson* v. *Halford*, 11 Ch. D. 959; 48 L. J. Ch. 548.

Shifting clause.

PROVIDED ALWAYS that if the second or any other [younger] son of the said —— or any issue male of such second or other

[younger] son shall become entitled to the family estate of —— and any younger son of the said —— or any issue male of his body entitled or inheritable under the aforesaid limitations or proviso shall be then living then and in such case and as often as the same shall happen the uses originally or by virtue of the last proviso limited to the son who or whose issue shall so become entitled as aforesaid shall cease (*u*) BUT my will is that if by virtue of such proviso the said hereditaments shall have shifted from any younger son of the said —— or from his issue male and there shall afterwards be a failure of issue male of all the sons of the said —— younger than the son from whom or from whose issue male the same shall have so shifted as aforesaid THEN and in that case the same hereditaments and premises shall return be and remain and be held in the manner in which the same would have been held if the proviso for shifting the same had not been inserted in this my will.

Shifting clauses.

(*u*) See, as to shifting clauses, *Micklethwait* v. *Micklethwait*, 4 C. B. (N.S.) 790; *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819; affirmed, [1902] A. C. 263. The operation of such a clause in a will is simply to accelerate the next remainder, and the person from whom the estate shifts is not deemed to be dead without issue, but he and his issue may take the estate under a subsequent limitation, *Jellicoe* v. *Gardiner*, 11 H. L. C. 323; 34 L. J. C. P. 282. As to the words "except an eldest son" or "become the eldest son," see *Tuite* v. *Bermingham*, L. R. 7 H. L. 634; *Bathurst* v. *Errington*, 2 App. Cas. 698; 46 L. J. Ch. 748; and Jarm. Wills, 1741.

Power to trustees to lease real estate (*w*), subject to wife's right to occupy part.

I EMPOWER my trustees until the sale of my real estate (but without prejudice to the directions hereinbefore contained as to the occupation by my wife of part of my estates at ——) to let the same or any part or parts thereof from year to year or for any term or terms of years in possession at the best rent or rents without taking any fine or premium subject to such covenants and conditions as they shall think reasonable AND I DIRECT that the rents interest dividends and yearly produce of my real and residuary personal estate for the time being unsold or unconverted (including the profits of my said business if carried on as aforesaid) shall be deemed annual income for the purposes of the trusts hereinbefore contained and be payable and applicable in the same or the like manner as the yearly produce of the trust fund aforesaid would if such fund were realised and invested be applicable.

Annual income of real and personal estate till sale, and of trade, to be applied in the same way as income of trust fund.

(*w*) The Settled Land Act, 1925 (15 Geo. 5, c. 18), by sects. 41 to 47, confers wide powers on the tenant for life of settled land of leasing for ordinary, or building, or mining purposes; and on a sale or grant for building purposes, or a building lease, sect. 56 of the Act gives to the

tenant for life powers as to the dedication of parts of the land for streets, roads, paths, squares, gardens, or other open spaces, with sewers, &c. See also sect. 83 of the Act.

Powers to trustees pending conversion by reference to Settled Land Act.

My trustees may exercise over or in relation to all or any real and leasehold hereditaments for the time being vested in them on the trusts of this my will or any undivided share or shares thereof all such powers of leasing and accepting surrenders of leases and entering into varying and rescinding contracts in that behalf and powers incidental or subsidiary thereto respectively and all such other powers of every description applicable to the premises as are by the Settled Land Act 1925 conferred on tenants for life.

Power to lend money to builders.

I EMPOWER my trustees to advance any sum or sums of money out of my residuary personal estate to any person or persons who shall contract to purchase or take on lease any part of the said trust premises for building purposes such advances respectively to be secured by way of mortgage or otherwise as my trustees shall deem sufficient.

Building land.

Special powers for its development.

I EMPOWER my trustees upon any such sale or sales lease or leases as are authorised by this my will or in contemplation thereof to enter into such covenants and to require such covenants to be entered into of a mutual character restrictive or otherwise for the better enjoyment of the lands sold and retained or of lands sold to different persons only as my trustees shall think proper And for the purposes of any streets or open spaces which they may lay out to pull down any buildings standing on my said estates and to sell or use the materials thereof the moneys arising therefrom when received to be held upon and for the trusts and purposes herein expressed and declared of and concerning the moneys to arise from the sale of my said trust estates And for all or any of the purposes aforesaid to enter into make execute and concur in all such contracts conveyances and assurances as my trustees shall think proper and to alter vary or modify on terms or gratuitously any such contracts conveyances and assurances.

Proviso as to mortgages and costs of transfer.

I DECLARE that it shall be lawful for my trustees in the execution of the power of [*or* trust for] sale hereinbefore contained to sell my real estates either subject to or discharged from the mortgages affecting the same respectively and in case the said estates or any part thereof shall be sold discharged from the said mortgages then to apply a competent part of the money to arise from the sale of the same estates in or towards

payment of the said mortgages respectively And that my trustees shall have full discretionary power and authority to take such measures and make such arrangements in relation to the said mortgages respectively either by paying off the same and taking transfers or assignments thereof or by obtaining advances from other persons upon transfers thereof or by way of indemnity or otherwise as shall be deemed necessary or convenient and to pay all costs charges and expenses incident to such measures or arrangements out of the capital moneys which shall come to their hands by virtue of this my will.

Deferred annuities to nephews, subject to prior limitations and annuity.

I DECLARE that from and after the death of the survivor of my wife and brother M. P. and the failure of the limitations hereinbefore contained in favour of my child or children and the issue of such child or children and subject and without prejudice to the annuity or yearly rent-charge of £—— hereinbefore limited to my nephew W. P. for his life my said hereditaments shall stand charged with the payment to each of my nephews [*names*] who for the time being shall not be beneficially entitled to the possession or the receipt of the rents issues and profits of my said hereditaments or any part or share thereof under or by virtue of the limitations hereinbefore contained of an annuity or yearly rent-charge of £—— to be issuing out of my said hereditaments and to be payable until the death of such nephew or until he shall be so entitled as aforesaid whichever event shall first happen and to be paid in even portions half-yearly clear of all deductions except property tax if then payable and the first payment thereof (*x*) to be made at the end of six calendar months next after the death of the survivor of my wife and the said M. P. and the failure of the limitations hereinbefore contained in favour of my child or children and the issue of such child or children.

Period of annuities.

First payment.

(*x*) See *Re Bywater*, 18 Ch. D. 17, where deferred annuities were given, and the direction as to the first payment was inconsistent with the prior gift.

Policies of assurance.

I EMPOWER my trustees notwithstanding the trust for sale hereinbefore contained to postpone for such period as they may deem advisable the sale of all or any of the policies of assurance on lives which may belong to me at my death [*or* the policies on the lives of A. of &c. B. of &c. and C. of &c.] and to pay the premiums on such policies respectively out of the annual income of my residuary estate and to receive in cash the bonuses already accrued or hereafter to accrue thereon respectively which when received shall be held and disposed of as part of the *corpus* of

the moneys to arise from the sale of my residuary estate or to surrender such bonuses as aforesaid or any of them in consideration of a proportionate decrease in the said premiums respectively or to allow such bonuses to be added to the policy moneys and in a case of a sale or disposition of the said policies to sell or dispose of the same respectively either by way of surrender to the office in consideration of a gross sum of money or in consideration of new policies for sums to be agreed upon on the lives respectively assured payable on the dropping of such lives respectively but without premiums in the meantime.

Power to trustees to carry on a farming business.

I AUTHORISE my trustees while any son of mine is under age or any daughter of mine is under age and unmarried or for such shorter period as they shall think fit to carry on my farming and grazing business and for that purpose to retain unsold all or such parts as they shall think fit of my household furniture plate household linen china books and other household effects carriages carts waggons vans motor-cars horses saddles harness and stable and garage furniture and effects and my dairy utensils implements of husbandry farming effects crops and live and dead stock with full discretionary powers as to insurance alteration disposition and increase or diminution of capital or stock and purchase and sale of stock whether live or dead employment of bailiffs stewards agents servants labourers and workmen and their salaries remuneration privileges powers and authorities and the extent of personal superintendence to be exercised by my trustees And I authorise my trustees in their discretion to accept a fresh lease or fresh leases of any leasehold farm or farms which I may hold at my death or to take on lease any other farm or farms for such term and on such conditions as they may think expedient And to take possession of and use in such business any unsold freehold or customary lands and property And generally to act in the management of such farming and grazing business and to use my real and personal property therein as if they were absolute owners or owner thereof AND I declare that my trustees shall be free from all responsibility and be fully indemnified out of my residuary estate in respect of any loss arising in relation thereto and shall have power to determine what part of the produce and moneys arising from the carrying on of such farm or farms shall be treated and applied as capital and what part as income and such determination shall be binding and conclusive on all persons interested under this my will or any codicil hereto.

Power of appropriation towards share.

I EMPOWER my trustees at any time or times in their discretion to exercise all such powers of appropriation in regard to any

part of my real or personal estate as are conferred upon a personal representative by section 41 of the Administration of Estates Act 1925 (*y*).

(*y*) Sect. 41 of the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), confers on personal representatives, but not on trustees, a power of appropriation in or towards satisfaction of a legacy or other interest or share in the property of the deceased, whether settled or not. See *Re Wragg*, [1919] 2 Ch. 58; 88 L. J. Ch. 269.

Maintenance by a percentage on portions.

AND I DIRECT that the trustees or trustee for the time being of the same term shall raise and apply for the maintenance and education of my child or children presumptively entitled to a portion or portions under the said settlement and this my will interest upon their respective portions in manner following that is to say for each son under the age of twelve years interest after the rate of one per cent. per annum for each son above the age of twelve years and under the age of sixteen years two per cent. per annum and for each son above the age of sixteen years three per cent. per annum and for each daughter under the age of twelve years one per cent. per annum and for each daughter above the age of twelve years three per cent. per annum until their respective portions shall become vested or they respectively shall previously die.

Advancements in testator's lifetime to be brought into account.

I DECLARE that the sum of £—— which I have applied for the benefit of my said son —— shall be taken as a satisfaction to that extent of the portion provided for him by my will and further that all other advances which I may hereafter make for the benefit of any of my children to the amount at any one time of £—— shall be in part satisfaction of the portions hereby provided for them (*z*).

(*z*) A fee paid to an architect by the testator to enable his son to learn the business is not an "advancement" for the benefit of the son and need not be accounted for, *Re Watney*, 56 S. J. 109.

Clause excluding rule in *Allhusen* v. *Whittell* (*a*).

I DECLARE that notwithstanding any rule of law or equity to the contrary my funeral and testamentary expenses and debts inclusive of the interest on such debts which may have accrued due from me at the date of my death and all instalments on account of any principal money payable out of my estate shall as between the persons entitled in possession and reversion respectively to the trust premises or any part thereof under the trusts hereinbefore declared be charged to and payable exclusively out of capital And that all interest on such debts and all annuities yearly rents and other periodical payments

payable out of my estate not being instalments of principal money shall be charged to and payable exclusively out of income.

(*a*) The principle of *Allhusen* v. *Whittell*, L. R. 4 Eq. 295; 36 L. J. Ch. 929, is that intermediate income of what is eaten up before the ascertainment of residue cannot itself be income of residue or payable, as such, to a tenant for life of residue, *Re McEuen*, [1913] 2 Ch. 704. The principle or rule applies to realty, *Marshall* v. *Crowther*, 2 Ch. D. 199. See note (*d*) to Prec. 15. And as to the mode in which the calculation should be made, see Law Quarterly Review, vol. xxx., No. 120, p. 481, and vol. xxxii., No. 126, p. 208, where the following clause, which might be adopted instead of the one above, is suggested:—

"I direct my executors in applying the rules of law for ascertainment as between life owner and remainderman of the true residue of a testator's estate to exclude for the purposes of adjustment the income derived from capital required to pay debts, legacies, and other similar deductions to the intent (where the circumstances admit adjustment on this basis) that the life owner shall simply be debited with interest on such deductions from my death until payment thereof respectively."

Marriage to be with consent of parents or guardians.

I DECLARE that the marriage after my death of any and every infant female beneficiary under this my will in order that her interest under the trusts hereinbefore declared may vest on such marriage shall be solemnised with the prior consent in writing of the parents or parent guardians or guardian if any for the time being of such infant.

Confirmation of marriage settlement.

I CONFIRM the settlement made on my marriage with my wife [*name*] and I declare that the provisions which by this my will or any codicil hereto are made for my said wife and children [and other issue] are to be in addition to and not in satisfaction of those contained in the said settlement (*b*).

(*b*) See note (*b*) to Prec. 15.

Provision in satisfaction of wife's jointure.

I DECLARE that the provision hereby made for my said wife is intended to be in satisfaction of the jointure to which she will be entitled after my death by virtue of the settlement made upon our marriage and that the said provision is made upon condition that she do at the request of my trustees but at the cost of my estate effectually release the hereditaments charged with the said jointure from all claims and demands in respect thereof.

Accruing shares, general direction as to.

I SUBJECT the accruing shares of each of my daughters under the trusts of this my will to all the trusts herein contained concerning the original sum of £—— hereby given to or in trust for each daughter inclusive of this clause.

Power to postpone conversion of hazardous investments.

Investment.

I EMPOWER my trustees notwithstanding anything hereinbefore contained at their discretion to continue all or any part of my personal estate in the state or upon the investments in or upon which the same shall be at the time of my death however doubtful or hazardous (*c*) or limited the description or nature of the property or investment may be or otherwise to call in and compel payment to sell and dispose of the same and to lay out and invest the moneys to be thereby raised and all other moneys to be from time to time received by them under the trusts or powers herein declared and contained in their names in some authorised trust investment or investments which investment or investments so to be made by my trustees and the annual income thereof shall be held under and subject to the same trusts as the trust premises for which the same shall be substituted were or would have been liable to under this my will.

Shares and other speculative property.

(*c*) This power is necessary in the case of a testator who leaves shares or other speculative property which at the time of his death may be at a low price or almost unsaleable in the market, but as to which reasonable expectation may be entertained of an increase in value. In the absence of such power the *prima facie* rule is that executors must realise the depreciated investments within twelve calendar months after the testator's death, see *Hughes* v. *Empson*, 22 Be. 181; *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605; 37 L. J. Ch. 550; *Marsden* v. *Kent*, 5 Ch. D. 598; 46 L. J. Ch. 497. As to the power of trustees to retain investments which have ceased to be authorised, see sect. 4 of the Trustee Act, 1925 (15 Geo. 5, c. 19).

Power to determine between capital and income, questions, &c.

I DECLARE that my trustees shall have the fullest powers of determining what articles pass under any specific bequest in this my will or any codicil hereto and of apportioning blended trust funds (*cc*) and of determining whether any moneys ought to be treated as income or capital and generally of determining all matters as to which any doubt difficulty or question may arise under or in relation to the execution of the trusts of this my will or any codicil hereto and I declare that every determination aforesaid whether made upon a question formally or actually raised or implied in any of the acts or proceedings of my trustees in relation to the premises shall bind all parties interested under this my will or any codicil hereto and shall not be objected to or questioned on any ground whatsoever.

(*cc*) See sect. 15 of the Trustee Act, 1925, *ante*, p. 123.

Condition not to dispute will.

I DECLARE that if the said A. B. or any person in his name or on his behalf or any person claiming through under or in trust for him shall at any time during the life of the said A. B. or within twenty-one years after his death dispute the validity

of this my will (*d*) or of any of the dispositions herein or in any codicil hereto contained or if the said A. B. or any such person as aforesaid shall at any time during such period as aforesaid refuse to confirm this my will or any codicil hereto or to do such acts and things as of the said A. B. or such person as aforesaid can be reasonably demanded for giving full effect to all or any of such dispositions or if any proceeding whatsoever shall at any time during such period as aforesaid be taken with the consent or connivance of the said A. B. or any such person as aforesaid by means or in consequence of which any estate or interest could be in any way attainable by the said A. B. or any person in his right of larger extent or value than is or shall be by this my will or any codicil hereto given to the said A. B. and such proceeding shall not be formally and at once disavowed stayed or resisted by the said A. B. to the full extent of his power and ability to do so THEN and in any such case all the dispositions herein or in any codicil hereto contained in favour of the said A. B. shall cease and be void to all intents and purposes whatsoever and are hereby revoked accordingly AND (in the event lastly hereinbefore contemplated) as to all the real estates so forfeited as aforesaid I GIVE and devise the same unto the said P. and Q. [*trustees of will*] to hold in the same manner and subject to the same trusts powers provisos and limitations as are herein declared provided and limited of or concerning my residuary real estate AND as to all the personal estate so forfeited as aforesaid I GIVE and bequeath the same unto Z. absolutely.

Condition not to dispute validity of will.

(*d*) In reference to conditions of this class, which are often found in wills, but the validity of which has been a good deal questioned, it may be observed that a condition not to dispute a will is, as to personalty, void unless there is a gift over, *Cleaver* v. *Spurling*, 2 P. W. 528. See Jarm. Wills, 1548; *Re Williams*, [1912] 1 Ch. 399; 81 L. J. Ch. 296; *Re Raven*, [1915] 1 Ch. 673; 84 L. J. Ch. 489.

Clause negativing the operation of principle of Locke King's Act (*e*).

I DECLARE that the several devisees of my real estate and specific legatees of my personal estate shall take the same exonerated from any mortgage debts or debt which at the time of my death may affect the same or any part thereof and that all such debts shall be considered as exclusively charged on my residuary estate.

(*e*) See note (*a*), Prec. 16.

Clauses negativing apportionment of rents, &c., current at death.

I DECLARE that no apportionment shall take place of rents of any of my real estate which shall be current or accruing at the time of my death (*f*).

(*f*) See the note on apportionment, note (*f*), Prec. 8.

I DECLARE that as between the several devisees and specific legatees under this my will on the one hand and my executors on the other hand there shall not be any apportionment of rents dividends or other periodical payments current at the time of my death.

I DECLARE that as between the capital and income of my estate rents dividends or other periodical payments current at the time of my death (except interest on money lent) shall not be apportionable.

Mutual wills (*g*).

I Mary Johnson of Sheffield spinster by this my will made this —— day of —— 19— give all my realty and personalty to my sister Jane Johnson whom I appoint my executor In witness &c.

I Jane Johnson of Liverpool spinster by this my will made this —— day of —— 19— give all my realty and personalty to my sister Mary Johnson whom I appoint my executor In witness &c.

Mutual wills and joint wills.

(*g*) Mutual wills, *i.e.* separate instruments made by two persons in favour of each other, must not be confounded with a joint will, *i.e.* a single instrument made by two persons, and intended by them to operate as the will of both. The term "mutual will" is sometimes applied to the latter kind of instrument; but the law of this country is said not to recognise such a document as a will, *Hobson* v. *Blackburn*, 1 Add. 274; and see Wms. Exors. 7; though it may be valid in equity as a contract, *Dufour* v. *Pereira*, 1 Dick. 419; distinguished in *In re Oldham*, [1925] 1 Ch. 75. As to the binding nature of an agreement to make mutual wills, see *Stone* v. *Hoskins*, [1905] P. 194; 74 L. J. P. 110.

A joint will made by two persons was admitted to probate as to so much of it as became operative on the first death in *In b. Piazzi-Smyth*, [1898] P. 7; 67 L. J. P. 4. Where two joint tenants agreed to make, and did make, mutual wills, each in favour of the other for life, this effected a severance of the joint tenancy, *Re Wilford's Estate*, 11 Ch. D. 267; 18 L. J. Ch. 243; *In b. Heys*, [1914] P. 192; 83 L. J. P. 152.

Survivorship.

Where before 1926, a person died possessed of real or personal estate, the heir-at-law or the next of kin respectively became entitled, unless the property could be shown to have passed to another by valid and effectual disposition or by survivorship. There was no presumption of law as to survivorship or simultaneous death. In each case it was a question of evidence, *Wing* v. *Angrave*, 8 H. L. C. 188; 30 L. J. (N.S.) Ch. 65. Where husband and wife, after executing mutual wills, each for the benefit of the other, were both drowned at sea, and there was no evidence of survivorship, survivorship was not presumed and the wills failed, *In b. Alston*, [1892] P. 142; 61 L. J. P. 92. But in the case of deaths of two persons after 1925, the younger is presumed to be the survivor, under sect. 184 of the Law of Property Act, 1925, which provides:—

Sect. 184.—"In all cases where, after the commencement of this

Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder." Presumption of survivorship in regard to claims to property.

In witness whereof I have hereunto set my hand this —— day of —— 19—. Testimonium clauses; —will on one sheet of paper.

In witness whereof I have hereunto set my hand and seal this —— day of —— 19—.

In witness whereof I have signed my name at the end of this my will contained in this and the preceding [*four*] sheets of paper this —— day of —— 19—. —will on several sheets.

In witness whereof I have to this my will contained in —— sheets of paper and also to a duplicate hereof set my hand this —— day of —— 19—. —will executed in duplicate.

In witness whereof I have in the presence of the two subscribing witnesses acknowledged as my signature the signature at the end of this my will contained in this and the [*four*] preceding sheets of paper the day and the year first hereinbefore written. —acknowledgment of signature by testator.

In witness whereof E. F. of &c. has in my presence and by my direction and in the presence of the two subscribing witnesses signed my name at the end of this my will contained in this and the [*four*] preceding sheets of paper this —— day of —— 19—. —signature by amanuensis.

Signed by A. B. of &c. gentleman as his last will in the presence of us present at the same time who in his presence and in the presence of each other subscribe our names as witnesses (*h*). Attestation clauses.

T. B. of —— Solicitor.
H. B. of —— Merchant.

(*h*) See note (*e*) to Prec. 1.

Signed by the above-named testator [testatrix] with his [her] mark as his [her] last will after the same had been read over to him [her] and when he [she] had knowledge of its contents in the presence of us present at the same time &c. *as before* (*k*). Signature of blind or illiterate testator.

(*k*) Under rule 71 of the Rules and Orders of 1862 (non-contentious) the registrars must before probate be satisfied of the testator's knowledge.

—signature after alterations.

SIGNED by A. B. of &c. as his last will in the presence of us present at the same time who in his presence and in the presence of each other subscribe our names as witnesses the alterations opposite to which respectively our initials are placed in the margin having been first made.

—acknowledgment of signature by testator.

SIGNED by A. B. of &c. acknowledging as his signature the signature at the end thereof in the presence of us together present at the same time who in his presence and in the presence of each other subscribe our names as witnesses.

—signature by amanuensis.

SIGNED by E. F. of &c. signing the name of A. B. of &c. in his presence and by his direction and in the presence of us present at the same time the said A. B. after the signature had been so made as aforesaid having acknowledged the same signature to be his signature in the presence of us present at the same time who in the presence of the said A. B. and in the presence of each other subscribe our names as witnesses.

Memorandum and attestation of alterations, on same paper as will.

MEMORANDUM that the interlineation between the —— and —— lines in the —— page of this my will and the alteration in the —— line of the —— page thereof and the obliteration in the —— line of the same page were made according to my desire As WITNESS my hand the —— day of —— 19—.

[Signed] A. B.

Signed by the said A. B. in the presence of us both present at the same time who in his presence and in the presence of each other hereunto subscribe our names as witnesses.

C. D. of &c.

E. F. of &c.

Marginal alteration.

FOR the words "————" through which I A. B. have drawn my pen [*or* which I have caused to be erased] it is my will that the words "————" be substituted and inserted.

[Signed] A. B.

Signed &c. [*as in last precedent*].

Memorandum of alterations, interlineations, and re-execution.

I A. B. have made in my own handwriting [*or* have caused to be made] in this my will the alterations hereinafter specified that is to say in the —— line from the top of the —— page the words "————" are erased and the words "————" are inserted in their stead The words "————" in the —— line from the bottom of the —— page and the —— and —— lines from the bottom of the same page are erased Between the words "————" and "————" in the —— line from the

top of the —— page the words "————" are inserted I DECLARE the above writing so altered to be my will.

[Signed] A. B.

Signed &c. [*as in last precedent*].

I A. B. of —— do hereby REVOKE my will of the —— day of —— 19—. Revocations of wills (*l*).

[Signed] A. B.

Signed &c. [*as in last precedent*].

(*l*) Neither of these revocations would be entitled to *probate*; but letters of administration will be granted with the memorandum annexed. See note (*a*) to Prec. 33.

I —— of —— do hereby revoke all the dispositions of my property contained in an instrument bearing date the —— day of —— 19— and purporting to be my last will which instrument I at the time of the execution thereof deposited with Messrs. —— of —— Solicitors.

[Signed] A. B.

Signed &c. [*as in last precedent*].

WHEREAS I A. B. of —— made my will on the —— day of —— 19— and have since intermarried with —— I hereby revive and confirm the said will this —— day of —— 19—. Revival of will revoked by marriage; —on a separate paper.

[Signed] A. B.

Signed &c. [*as in last precedent*].

I A. B. of &c. hereby confirm the above will this —— day of —— 19—. Revival of will; —on same paper with the will.

[Signed] A. B.

Signed by the said A. B. of &c. in the presence of us present at the same time who in his presence and in the presence of each other have hereunto subscribed our names and such signature by the said A. B. and by us as witnesses took place between [*four*] and [*five*] o'clock in the afternoon of [*Monday*] the —— day of —— 19— after (*m*) the solemnisation on that day of the ceremony of marriage between the said A. B. and Mary now his wife.

J. K. of &c.

L. M. of &c.

(*m*) See note (*a*) to sect. 18 of the Wills Act, *ante*, p. 35.

THIS IS A CODICIL to the will of me —— which will bears date the —— day of —— 19— WHEREAS since the date of the said will I have intermarried with—— NOW I HEREBY give to my Codicil made after marriage.

wife for her life the annual sum of £—— to begin from the day of my death and to be paid to her by equal half-yearly payments and I declare that my children by her shall participate equally with my other children in my general real and personal estate according to the trusts of my will In all other respects I CONFIRM the said will Dated this —— day of —— 19—.

Codicil reviving a will previously revoked.

WHEREAS I A. B. of —— made my will dated the —— day of —— 19— and have since revoked the same Now I hereby ANNUL such revocation and DECLARE that the said will is valid and subsisting Dated this —— day of —— 19—.

Codicil.

THIS IS A CODICIL to the will dated the —— day of —— 19— of me A. B. of &c. My son W. having since the date of my said will died without leaving issue I DIRECT that the property comprised in the specific and pecuniary devises and bequests contained in my said will to or in favour of my said son W. shall fall into my residuary estate AND that my said will shall take effect as if in the residuary devise and bequest (*n*) therein contained the names of my two children T. and H. were substituted for the names of my three children the said W. T. and H. I CONFIRM my said will in all other respects Dated this —— day of —— 19—.

(*n*) In this case, if the testator, who had by his will given his residuary real and personal estate equally amongst his three sons *by name*, had died without making this codicil, the death, in his lifetime, of one of the three sons, without leaving issue who survive the testator, would have caused an intestacy as to one-third of the residue.

APPENDIX.

I.

THE following enactment is not repealed by the Wills Act, 1 Vict. c. 26.

TESTAMENTARY GUARDIANS : The 12 Car. 2, c. 24, s. 8 (see *ante*, p. 221), enacts, "That where any person hath or shall have any child or children under the age of twenty-one years and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time in *ventre sa mère* [*or whether such father be within the age of twenty-one years, or of full age*], by his deed executed in his life-time, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of twenty-one years or any lesser time, to any person or persons in possession or remainder, other than popish recusants; and that such disposition of the custody of such child or children made since the 24th of February, 1645, or hereafter [*i.e.* after 1660] to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise : And that such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass, against any person or persons who shall wrongfully take away or detain such child or children, for the recovery of such child or children; and shall and may recover damages for the same in the said action, for the use and benefit of such child or children."

12 Car. 2, c. 24.

Fathers may dispose of custody of infants by deed or will.

The 9th section enacts, "That such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements and hereditaments of such child or children; and also the custody, tuition and management of the goods, chattels and personal estate of such child or children, till their respective age of twenty-one years, or any lesser time, according to such disposition aforesaid; and may bring such action or actions in relation thereunto, as by law a guardian in common socage might do."

Management of lands and personal estate of infants by their guardians.

12 Car. 2, c. 24.

But sect. 10 provides, "That this Act, or anything therein contained, shall not extend to alter or prejudice the custom of the City of London, nor of any other city or town corporate, or of the town of Berwick-upon-Tweed, concerning orphans; nor to discharge any apprentice from his apprenticeship."

These enactments remain in force, except as to the italicised passage in brackets in sect. 8.

See also the Guardianship of Infants Act, 1925 (*ante*, p. 221). And see as to the power to appoint guardians in wills under sect. 11 of the Wills Act, the Wills (Soldiers and Sailors) Act, 1918, s. 4 (*ante*, p. 27).

II.

ON DOMICILE.

Personalty governed by *lex domicilii*. Realty by *lex loci rei sitæ*.

The law of movables follows the law of the owner's domicile (*mobilia sequuntur personam*). The law of immovables is that of the country in which the property is situate (*lex loci rei sitæ*). A will disposing of real estate must therefore be executed with the forms required by the law of the country in which such estate is situate, and this applies equally to the disposition of leaseholds for years situated in England, *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461; and see *Duncan* v. *Lawson*, 41 Ch. D. 394; 58 L. J. Ch. 502; *Pepin* v. *Bruyère*, [1902] 1 Ch. 24; 71 L. J. Ch. 39; *Re Grassi*, [1905] 1 Ch. 584; 74 L. J. Ch. 341; and Jarm. Wills, ch. 1.

Domicile and allegiance, distinct.

Domicile is distinct from allegiance. Every person at his birth becomes the subject of some particular country by the tie of natural allegiance, which fixes his political status, and becomes subject to the law of domicile, which determines his civil status. There is the same distinction between allegiance and domicile as between *patria* and *domicilium*. Though a man may change his domicile as often as he pleases, he could not, before the Naturalization Act, 1870 (33 & 34 Vict. c. 14, s. 6), cast off his natural allegiance. And see now the British Nationality and Status of Aliens Acts, 1914 and 1918 (4 & 5 Geo. 5, c. 17, and 8 & 9 Geo. 5, c. 13), and ss. 13, 14, 15, and 16 of the former.

By the Roman law a man might be without a domicile (see J. G. Phil., Prin. Jurisp. 164); but the English law considers every person as domiciled somewhere or other.

Domicile, of three kinds.

Domicile is of three kinds: 1. Of birth or origin; 2. By operation of law; 3. Of choice (R. Phil. Dom. 13; see also Sto. Conf. Laws, ch. 3; Westlake, Intern. Law, ch. 3).

"Domicile" answers very much to the common meaning of our word "home," and where a person possesses two residences, the phrase "he made the latter his home," would point out the latter to be his domicile (Phil. Dom. 13). But see Dicey, Conflict of Laws, 68, 90—93.

1. Domicile of birth or origin—

Domicile of origin.

The domicile of origin is that arising from a man's birth and connections. It is involuntary, the creation of law, not of the person.

The law attributes to every child, as soon as he is born, the domicile of his father if the child be legitimate, of his mother if the child be illegitimate.

If a child is born while its parents are on a journey, or temporarily absent from home, the parent's domicile, and not the accidental place of birth, is the domicile of the child; Phil. Dom. 25; *Somerville* v. *Somerville*, 5 Ves. 750, 786—7.

DOMICILE.

Domicile of origin revives and exists whenever there is no other domicile. It may be extinguished by act of law, but cannot be destroyed by the will or act of the man himself, *Udny* v. *Udny*, L. R. 1 Sc. App. 441.

2. Domicile by operation of law—

Domicile by operation of law.

This head comprises those who are under the control, and to whom the law gives the domicile, of another, and those on whom the State fixes a domicile. For example—The wife's domicile is that of her husband, Phil. Dom. 27—36; Westlake, Intern. Law, 325; *Dalhousie* v. *M'Douall*, 7 C. & F. 817; *Bremer* v. *Freeman*, 10 Moo. P. C. 306; *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; 29 L. J. P. 34; and this is the case, even though they are living apart, *Warrender* v. *Warrender*, 2 C. & F. 488; *Whitcomb* v. *Whitcomb*, 2 Cur. 351; *Re Daly's Settlement*, 25 Be. 456; 27 L. J. Ch. 751. After the death of her husband, the widow retains his domicile until she acquires another, *Gout* v. *Zimmermann*, 5 No. Cas. 440. A divorced woman, *Williams* v. *Dormer*, 2 Rob. 505, and also, it is conceived, one judicially separated from her husband (since by 20 & 21 Vict. c. 85, s. 7, a judicial separation has "the same force and the same consequences as a divorce *a mensa et thoro*"; see *Dolphin* v. *Robins*, 7 H. L. C. 390; 29 L. J. P. 11; *Re Mackenzie*, [1911] 1 Ch. 578; 80 L. J. Ch. 443), has the option of taking a new domicile, but until she exercises this option, her marital domicile is not changed. As to whether a wife who is deserted by her husband can acquire a domicile of her own, see *Le Sueur* v. *Le Sueur*, 1 P. D. 139; 45 L. J. P. 73.

Wife.

Minor.

The domicile of a legitimate unemancipated minor is that of the father, or of the mother during widowhood, if the minor resides with the mother, *Re Beaumont*, [1893] 3 Ch. 490; 62 L. J. Ch. 923; or (though this is disputed) of the guardian, Phil. Dom. 37—54; Westlake, Intern. Law, 323. Of his own accord a minor cannot change his domicile, *Somerville* v. *Somerville*, 5 Ves. 750, 787; but if the mother acquire a new domicile (as by a second marriage) it is usually communicated to an infant residing with her, *Re Beaumont*, [1893] 3 Ch. 490, 497; 62 L. J. Ch. 923, but not necessarily; see Dicey, Conflict of Laws, 130. The mother on her second marriage may abstain from changing the domicile of her infant children, *Re Beaumont*, [1893] 3 Ch. 490; 62 L. J. Ch. 923; and it has been said that the guardian also has the power of changing the domicile of his ward, provided it be done *sine mala fide*, see 3 Mer. 80; Westlake, Intern. Law, 324; see also *Stuart* v. *Moore*, 4 Macq. 1; *Stuart* v. *Marquis of Bute*, 9 H. L. C. 440; though this power of the guardian is doubtful, *Douglas* v. *Douglas*, L. R. 12 Eq. 617; 41 L. J. Ch. 74. A legacy bequeathed to an infant domiciled abroad may be paid when the infant becomes of age by the law of England or of the place of domicile, whichever first happens; and in the meantime must be dealt with in the usual way as an infant's legacy, although by the law of the place of domicile the guardian of the infant is entitled to receive the legacy, *Re Hellman's Will*, L. R. 2 Eq. 363; 39 L. J. (N.S.) Ch. 760.

Emancipation of minor.

Marriage emancipates a minor, and gives him the power of choosing a new domicile; so by accepting an office from which he is not removable, or by entering into a house of commerce with the consent of those under whose control he is, a minor becomes emancipated, and capable of acquiring a domicile of his own. But, for a complete and perfect emancipation, the relation contracted by the minor must be one which wholly and permanently excludes the parental control, *Rex* v. *Wilmington*, 5 B. & Al. 525. A soldier or marine is emancipated by his entry into the service of the Crown; but in such a case the parental authority is suspended only, not destroyed, and if the service of the Crown should cease before the age of twenty-one is attained, the parental control revives, *Rex* v. *Walpole St. Peter's*, cited in *Rex* v. *Woburn*, 8 T. R. 479; *Rex* v. *Rotherfield Greys*, 1 B. & C. 345. But voluntary entrance into a local militia, *Reg.* v. *Scammonden*, 8 Q. B. 349; 15 L. J. M. C. 30; or a police force, *Reg.* v. *Selborne*, 29 L. J. M. C. 56; or the service of the captain of a merchant ship, *Rex* v. *Lytchet Matraverse*, 7 B. & C. 226; 6 L. J. M. C. (o.s.) 11, does not emancipate a minor.

Posthumous, illegitimate, or of unknown parents.

The domicile of a posthumous, or of an illegitimate, minor is that of the mother; if the parents are unknown, it is the place of birth or discovery of the child, Westlake, Intern. Law, 324.

Student.

One who sojourns in a particular place for the purpose of prosecuting his studies does not acquire a domicile in that place, Phil. Dom. 54.

Lunatic.

It would seem that a lunatic retains the domicile which he possessed when he began to be legally treated as insane, Dicey, Conflict of Laws, 149.

Servant.

As a general rule, a domestic servant preserves the domicile which he possessed before entering into service; but this is a question depending upon the particular circumstances of each case, Phil. 57—60; and *a fortiori* in any other kind of service the circumstances must be taken into account as criteria of the *animus manendi*.

Public officer.

The holder of an office of a temporary and revocable nature does not change his original domicile, *Att.-Gen.* v. *Rowe*, 1 H. & C. 31; but if the office be not revocable, and its duties necessitate residence in a particular place, then the holder of such office acquires a domicile at that place, Phil. 61—79. The residence required must, however, be constant, and not occasional merely, *Somerville* v. *Somerville*, 5 Ves. 750.

Military or naval officer.

Thus the civil and military officers of the late East India Company acquired an Indian domicile, *Munroe* v. *Douglas*, 5 Mad. 379, 404; *Bruce* v. *Bruce*, 6 Br. P. 566; 2 B. & P. 229 n.; *Craigie* v. *Lewin*, 3 Cur. 435; *Hepburn* v. *Skirving*, 9 W. R. 764; but the domicile of an officer in the general service of the Crown is unchanged by his serving in foreign parts, Phil. 78, 79; *Att.-Gen.* v. *Pottinger*, 6 H. & N. 733; 30 L. J. Ex. 284; and this applies to an acquired domicile as well as to a domicile of origin, *Re Macreight*, 30 Ch. D. 165; 55 L. J. Ch. 28. And in the case of an officer, in the service either of the Crown or of the E. I. C., absent on furlough, and many years resident abroad, the presumption of law was against the acquisition of a

Domicile. foreign domicile, *Hodgson* v. *De Beauchesne*, 12 Moo. P. C. 285. But the presumption, raised by the continuing on half-pay in the navy, against a change of domicile, may be rebutted, *Cockrell* v. *Cockrell*, 25 L. J. Ch. 730.

Persons who enter the military service of a foreign state acquire a domicile in that state, *Ommaney* v. *Bingham*, before H. of L., March 18, 1796; see 5 Ves. 757, but (as between the different countries which together constitute the United Kingdom) it seems that subjects of the King do not, by entering the service of the Crown, acquire an English domicile, but retain their domicile of origin. Thus, a domiciled Irishman by entering the Royal Artillery, *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; 29 L. J. P. 34; and a Jerseyman by entering the Royal Navy, *In b. Patten*, 6 Jur. (N.S.) 151, did not acquire a domicile in England. See also *Re Mitchell*, 13 Q. B. D. 418; 53 L. J. Ch. 1067, where these cases were approved and followed.

Ambassador. An ambassador preserves the domicile of the country which he represents and to which he belongs, and this privilege extends to those resident with him, Phil. 79—86. But a person who has acquired a foreign domicile does not revive his domicile of origin by accepting an appointment as ambassador from his native country to that in which he has acquired his domicile, *Heath* v. *Samson*, 14 Be. 441. So, also, a Portuguese, who had acquired an English domicile, did not lose it by becoming *chargé d'affaires* in this country for the Portuguese sovereign, *Att.-Gen.* v. *Kent*, 1 H. & C. 12; 31 L. J. Ex. 391.

Consul. Consuls, also, when sent out from one country to represent it in another, retain the domicile of the country which they serve, Westlake, Intern. Law, 343; see, however, Sto. Conf. Laws, 60. But if a government chooses to employ as consul a person already resident in the foreign country, his domicile is not changed by the appointment. As to consuls, see *Maltass* v. *Maltass*, 1 Rob. 79; *Gout* v. *Zimmermann*, 5 No. Cas. 445; *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611; 28 L. J. P. 17.

Ecclesiastic. The domicile of a beneficed ecclesiastic is the place where his benefice is situate, Phil. 86.

Prisoner. Exile. A prisoner preserves the domicile of his country, Phil. 87; *Burton* v. *Fisher*, 1 Milw. 183. A person transported for life lost his original domicile, Phil. 88—90.

Fugitive. A fugitive from his country, on account of civil war, retains his domicile in his native land, Phil. 90—97. And, generally, a domicile will not be lost by constrained residence in a foreign country, *In b. Duchesse d'Orléans*, 1 Sw. & Tr. 253; 28 L. J. P. 129. But of course a prisoner, exile, fugitive, or emigrant may, by continuing to reside in a country after his power of choice is restored to him, like the minor who resides in a place after his minority has ceased, acquire a domicile therein: see as to the refugee, *Collier* v. *Rivaz*, 2 Cur. 855; and as to the acquisition of a domicile during exile, by forming an attachment to the place of exile, *Heath* v. *Samson*, 14 Be. 441.

3. Domicile of choice—

Of choice. Domicile of choice is voluntary, the creation of the person. And it may be taken as a general maxim of European and

American law that every person *sui juris* is at liberty to choose his domicile, and to change it according to his inclination, Phil. Dom. 98; a peer of the British Parliament may acquire a foreign domicile of choice, *Hamilton* v. *Dallas*, 1 Ch. D. 257; 45 L. J. Ch. 15. But as in the *Digest* it is laid down that "*Domicilium re et facto transfertur, non nudâ contestatione*," that facts and actions are required to prove a change of domicile (see J. G. Phil., Prin. Jurisp. 162), so it is a principle of English law that the domicile of origin must prevail, until the person has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile, *Somerville* v. *Somerville*, 5 Ves. 750; *Munro* v. *Munro*, 7 C. & F. 842; *Lord* v. *Colvin*, 4 Drew. 366; 28 L. J. Ch. 361; *De Bonneval* v. *De Bonneval*, 1 Cur. 856; *Hodgson* v. *De Beauchesne*, 12 Moo. P. C. 285; *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441; 29 L. J. P. 1; and to acquire a domicile there must be actual residence in the place chosen, which must be the principal and permanent residence, *Dalhousie* v. *M'Douall*, 7 C. & F. 817; *Waddington* v. *Waddington*, 36 T. L. R. 359. The domicile of origin adheres until a new domicile is acquired, and the onus of proving a change of domicile is on the party who alleges it, *Bell* v. *Kennedy*, L. R. 1 Sc. App. 307; *Att.-Gen.* v. *Countess Blucher de Wahlstatt*, 3 H. & C. 374; 34 L. J. Ex. 29. And when a domicile of choice is acquired, the domicile of origin is in abeyance only, but is not extinguished, *Udny* v. *Udny*, L. R. 1 Sc. App. 441.

Acquired domicile.

An acquired domicile was defined by Kindersley, V.-C., in *Lord* v. *Colvin*, 4 Drew. 366; 28 L. J. Ch. 361, as follows:— "That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home." But when the same case (nom. *Moorhouse* v. *Lord*, 10 H. L. C. 272; 32 L. J. Ch. 295) came before the House of Lords, the Vice-Chancellor's definition was rejected as being too extensive; it would reach the case of a person of delicate health going to a milder climate with the determination of remaining there until his health was restored; and it omitted one important element, viz., the fixed intent of abandoning one domicile and permanently acquiring another. The change of residence must be accomplished *animo et facto*; and, briefly, the *factum* required is a change of residence, voluntarily assumed, and permanent in character, *Haldane* v. *Eckford*, L. R. 8 Eq. 631; and the *animus* required is an intention to settle in a new country as a permanent home, *Douglas* v. *Douglas*, L. R. 12 Eq. 617; 41 L. J. Ch. 74. See *Bell* v. *Bell*, [1922] 2 Ir. R. 152.

Definition.

Where a person resides in a foreign country for the benefit of his health, such residence is not necessarily to be considered a compulsory residence, and a foreign domicile may be acquired, *Hoskins* v. *Matthews*, 8 D. M. & G. 13, 28; 25 L. J. Ch. 689. But see *Att.-Gen.* v. *Fitzgerald*, 3 Drew. 610; 25 L. J. Ch. 743; *The Lauderdale Peerage*, 10 App. Cas. 692, at

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page 740. But where a native of the United States resided in England for twenty-seven years, always describing himself as an American citizen, and was not able to return to America on account of the state of his health, which rendered a voyage across the Atlantic impracticable, it was held that he had not abandoned his domicile of origin, *Winans* v. *Att.-Gen.*, [1904] A. C. 287; 73 L. J. K. B. 613. And see *Huntly* (*Marchioness*) v. *Gaskell*, [1906] A. C. 56; 75 L. J. P. C. 1.

Evidence as to domicile.

The question of domicile is one of law and fact, J. G. Phil., Prin. Jurisp. 166; but more of fact than of law, *Bempde* v. *Johnstone*, 3 Ves. 198, 201; the proof of intention is the turning-point in questions of this nature, J. G. Phil. 167. All the acts of the deceased are taken into consideration as evidence with respect to his domicile. Oral declarations appear to be but slightly esteemed, *Doucet* v. *Geoghegan*, 9 Ch. D. 441; but to statements in letters great weight was given in the balance of evidence in *Munro* v. *Munro*, 7 C. & F. 842; the locality of a mansion-house kept up by the person whose domicile is in dispute, the place at which his wife and children have resided, the depositaries of his heirlooms, or valuable chattels, or his papers and muniments, his description in legal documents, his possession and exercise of political rights and payment of taxes, the length of time during which he has resided in any one place, have all more or less weight in a case of disputed domicile, Phil. Dom. Ch. 9; Jarm. Wills. ch. 1, iv.; Deane, Wills, 27 *et seq.*; *Lord* v. *Colvin*, 4 Drew. 366; 28 L. J. Ch. 361; *Anderson* v. *Laneuville*, 9 Moo. P. C. 325; 2 Sw. & Tr. 24; *Aitchison* v. *Dixon*, L. R. 10 Eq. 589; 39 L. J. Ch. 705; *Brunel* v. *Brunel*, L. R. 12 Eq. 298; *Stevenson* v. *Masson*, L. R. 17 Eq. 78; 43 L. J. Ch. 134; *Platt* v. *Att.-Gen. of New South Wales*, 3 App. Cas. 336; 47 L. J. P. C. 26. In *Re Tootal's Trusts*, 23 Ch. D. 532; 52 L. J. Ch. 664, it was held that the difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile. But the opinion in that case and the dictum of Lord Watson in *Abd-ul-Messih* v. *Farra*, 13 App. Cas. 431, 445, as to domicile in an extra-territorial country have been overruled in *Casdagli* v. *Casdagli*, [1919] A. C. 145. See also *The Indian Chief*, 3 Rob. Adm. 29; *Maltass* v. *Maltass*, 1 Rob. Ecc. 67.

Until an acquired domicile is finally abandoned, the domicile of origin does not revive, *Craigie* v. *Lewin*, 3 Cur. 435; *Gout* v. *Zimmermann*, 5 No. Cas. 440; *In b. Bianchi*, 3 Sw. & Tr. 16; *In b. Raffenel*, 3 Sw. & Tr. 49; 32 L. J. P. 203. But the domicile of origin revives the moment the acquired domicile is abandoned; the abandonment of the acquired domicile *ipso facto* restores the original domicile, and the original domicile remains until a second domicile of choice has been acquired, *Udny* v. *Udny*, L. R. 1 Sc. App. 441; *King* v. *Foxwell*, 3 Ch. D. 518; 45 L. J. Ch. 693. In order to abandon the domicile of choice and revive the domicile of origin, it is not sufficient for a person to form the intention of leaving the domicile of choice, but he must actually leave it with the intention of

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leaving it permanently, *Re Marrett*, 36 Ch. D. 400. And see *Drexel* v. *Drexel*, [1916] 1 Ch. 251; 85 L. J. Ch. 235.

And, generally on this subject, see Dicey, Conflict of Laws.

Will of personalty, *lex domicilii*.

By the *jus gentium*, the law of the testator's domicile at the time of making his will and of his death (if there is no intermediate change) must govern the form of the will of movables and the solemnities of its execution, *Bremer* v. *Freeman*, 10 Moo. P. C. 306; *De Bonneval* v. *De Bonneval*, 1 Cur. 856; *Dolphin* v. *Robins*, 7 H. L. C. 390; 29 L. J. P. 11; *Re Daly's Settlement*, 25 Be. 456; 27 L. J. Ch. 751; *Re Cunnington*, 68 S. J. 118. But until Lord Kingsdown's Act (*post*, p. 416), where the law of the domicile at the date of the will differed from the law of the domicile at the testator's death, the latter law prevailed, *Bremer* v. *Freeman*, *ubi sup.*; *Whicker* v. *Hume*, 7 H. L. C. 124; 28 L. J. Ch. 396.

Power of appointment.

A power of appointment by will is validly exercised by a will in accordance with the Wills Act though the person appointing be domiciled abroad and the will be not validly executed according to the law of domicile, *Murphy* v. *Deichler*, [1909] A. C. 446; 78 L. J. P. C. 159, or by a will executed in accordance with the law of the testator's domicile, though not with the requirements of the Wills Act, *Re Price*, [1900] 1 Ch. 442; 69 L. J. Ch. 225; and see *Re Simpson*, [1916] 1 Ch. 502; 85 L. J. Ch. 329; *Re Wilkinson's Settlement*, [1917] 1 Ch. 620; 86 L. J. Ch. 511; *Re Lewal's Settlement Trusts*, [1918] 2 Ch. 391; 87 L. J. Ch. 588; *Re Strong*, [1925] W. N. 176. But unless s. 10 of the Wills Act applies to the will exercising a power, the will must be made in strict compliance with the terms of the power, *Barretto* v. *Young*, [1900] 2 Ch. 339; 69 L. J. Ch. 605. See Note 20 in the Appendix to Dicey, Conflict of Laws; Jarm. Wills, 800.

That the right to probate in England is regulated by the law of the testator's domicile as it existed at the time of his death, and is not affected by subsequent events, see *Lynch* v. *Provisional Government of Paraguay*, L. R. 2 P. & D. 268; 40 L. J. P. 81.

If a foreigner domiciled abroad makes a will limited to English assets, and appoints persons in England for the limited purpose of collecting the English assets and handing them over to the executor of the domicile, the Court will give effect to such a will by granting administration to the persons so appointed in England for the use and benefit of the executor of the domicile, *In b. Briesemann*, [1894] P. 260; 63 L. J. P. 159. But see *In b. Meatyard*, [1903] P. 125; 72 L. J. P. 25; *In b. Levy*, [1908] P. 108; 77 L. J. P. 57. And see Law Quarterly Review, vol. xxix. No. 113, p. 38 *et seq.*; and *In b. Cocquerel*, [1918] P. 4; 87 L. J. P. 47.

As to restrictions on dealing with personalty.

Restrictions on the dealing with personalty, imposed by the will of an Englishman domiciled abroad, executed with the forms required by the law of his domicile, if of a nature recognised by the English law, will be upheld by our Courts, even though such restrictions are not recognised by the *lex domicilii decedentis*, see *Peillon* v. *Brooking*, 25 Be. 218; *Van Grutten* v.

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Digby, 31 Be. 561; 32 L. J. Ch. 179; *Colliss* v. *Hector*, L. R. 19 Eq. 334; 44 L. J. Ch. 267. If a testator directs that his will should be construed according to some law other than that of England in which his will is proved, the Court will give effect to that direction, *Bradford* v. *Young*, 29 Ch. D. 617; 54 L. J. Ch. 96.

Legacy duty.

The domicile at the time of his death of an owner of personalty determines whether it is or is not liable to legacy duty; when a British subject or foreigner dies domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate, and therefore liable to duty, *Att.-Gen.* v. *Napier*, 6 Exch. 217; 20 L. J. Ex. 173; but if he dies domiciled out of England then the whole of his personal property, wherever situate, is to be regarded as situate in the country of domicile, and therefore exempt from legacy duty, *Thomson* v. *Adv.-Gen.*, 12 C. & F. 1; *Lord Advocate* v. *Jaffrey*, 89 L. J. P. C. 209.

Succession duty.

Succession duty is not payable on legacies given by the will of a person domiciled in a foreign country, *Wallace* v. *Att.-Gen.*, L. R. 1 Ch. 1; 35 L. J. Ch. 124.

Estate duty.

By the Finance Act, 1894 (57 & 58 Vict. c. 30), estate duty is payable in respect of all property situated in the United Kingdom on the death of a deceased person, whatever may be his domicile at the time of his death. No duty is payable in respect of immovable property situated out of the United Kingdom. As to movable property situated out of the United Kingdom, passing on the death of the deceased, estate duty is payable if, under the law in force before the passing of the Act (July 31, 1894), legacy duty or succession duty is payable in respect thereof.

As to death duties, see Note 8 in the Appendix to Dicey, Conflict of Laws.

Names of further cases on domicile.

See further as to domicile, *Frere* v. *Frere*, 5 No. Cas. 593, upon the will of a British subject domiciled in and dying at Malta; *In b. Howard*, *ib.* 616, upon the will of a British subject domiciled in England and dying in Norway; *Maltass* v. *Maltass*, 3 Cur. 231, as to the will of an Englishman dying in Turkey; *Lyne* v. *De la Ferté*, 102 L. T. 143, and *Re Lyne's Settlement Trusts*, [1919] 1 Ch. 80, as to the will of a domiciled Englishman residing in France; *Collier* v. *Rivaz*, 2 Curr. 855, on the will of a British subject dying domiciled in Belgium; *In b. Osborne*, 4 W. R. 164, on the will of an Englishman domiciled in Spain; *Reynolds* v. *Kortright*, 18 Be. 417, a case upon a will written in Spanish of an Englishman dying whilst on a pleasure trip in Cuba; *M'Cormick* v. *Garnett*, 5 D. M. & G. 278; 23 L. J. Ch. 777; *Duncan* v. *Cannan*, 7 D. M. & G. 78; 24 L. J. Ch. 460, both cases on the Scotch law of husband and wife; *Aikman* v. *Aikman*, 3 Macq. 854; and *Re Wright's Trusts*, 2 K. & J. 595; 25 L. J. Ch. 621, a case in which it was held that a child born before marriage of a domiciled Englishman by a French woman was not, by the subsequent marriage in France of the putative father and the mother, made legitimate so as to share in a bequest to children contained in the will of a person domiciled in England.

Two domiciles.

That a man cannot, for purposes of succession, have two domiciles, see *Forbes* v. *Forbes*, Kay, 341; 23 L. J. Ch. 724. As to a trading company, see *Carron Co.* v. *Maclaren*, 5 H. L. C. 416; 24 L. J. Ch. 620; and as to a foreigner obtaining in this country a domicile for the purposes of commerce, see *Re Capdevielle*, 2 H. & C. 985; 33 L. J. Ex. 306.

War.

In time of war a person is for commercial purposes domiciled in the country where he resides, and a person domiciled in the enemy's country is deemed an alien enemy, Dicey, Conflict of Laws, 740. As to restrictions on aliens in time of war, see Aliens Restrictions Act, 1914 (4 & 5 Geo. 5, c. 12); *Princess Thurn and Taxis* v. *Moffitt*, [1915] 1 Ch. 58; 84 L. J. Ch. 220.

Distribution by the *lex domicilii*.

Administration by *lex loci*.

The doctrine that, in regard to personalty, the *lex domicilii* prevails, respects only the devolution and distribution of the property, and not the administration thereof: for the Court of Administration is, by our law, regulated by the *lex loci rei sitæ*; and the estate must be administered in the country in which possession is taken of it under lawful authority, *Preston* v. *Lord Melville*, 8 C. & F. 1. See also *Re Bonnefoi*, [1912] P. 233; 82 L. J. P. 17, and cases there cited.

Validity of marriage as affected by domicile.

The law of domicile, in addition to its influence on the devolution of property by its bearing on the validity of wills, affects such devolution by its bearing on the validity of marriages. The validity of a marriage in England must be decided according to the law of England, though the domicile of one of the contractors is foreign, see *Chetti* (*Venugopal*) v. *Chetti* (*Venugopal*), [1909] P. 67; 78 L. J. P. 23, and cases there cited; and *Rex* v. *Hammersmith Superintendent Registrar of Marriages*, [1917] 1 K. B. 634; 86 L. J. K. B. 210.

As to marriages abroad within the lines of the British army and marriages of British subjects abroad, see Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23); *Hay* v. *Northcote*, [1900] 2 Ch. 262; 69 L. J. Ch. 586; and as to regulations for marriages between British subjects and foreigners, see Marriage with Foreigners Act, 1906 (6 Edw. 7, c. 40). Although the general rule is that the validity of a marriage and the legitimacy of a child are to be determined by the *lex domicilii*, it was held in *Doe* v. *Vardill*, 7 C. & F. 895, that a child born in Scotland before marriage of parents domiciled there, though by Scotch law legitimate by reason of the subsequent marriage of the parents, was not capable of taking land in England as heir to his father; and see *Re Don's Estate*, 4 Drew. 194. But in *Re Grey's Trusts*, [1892] 3 Ch. 88; 61 L. J. Ch. 622, it was held by Stirling, J., that this rule applies only in case of an intestacy, and does not affect the case of a devise of real estate to "children." A bequest of personalty in an English will to children means to legitimate children. If the bequest is to the children of a foreigner, this means to the legitimate children of the foreigner. To determine who are his legitimate children the domicile of the father must be looked at, *Re Grey's Trusts*, *ubi sup.*; and as to "next of kin," see *Re Fergusson's Will*, [1902] 1 Ch. 483; 71 L. J. Ch. 360. According to English law, where at the time of the birth of an illegitimate child the father has his domicile in England, no subsequent change of

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domicile can render legitimation practicable, *Udny* v. *Udny*, L. R. 1 Sc. App. 441.

Where the parties have the same domicile the validity of the marriage depends upon the law of the domicile, *Re Bozzelli's Settlement*, [1902] 1 Ch. 751.

As to marriage, see Dicey, Conflict of Laws, 613; and as to legitimacy, *ibid.* 479.

24 & 25 Vict. c. 114.

In the session of 1861 an Act was passed to amend the law with respect to wills of personalty as affected by the domicile of the testators. By this Act, 24 & 25 Vict. c. 114, commonly called Lord Kingsdown's Act, and in the Short Titles Act, 1896, called the Wills Act, 1861, it is enacted (sect. 1) that every will made out of the United Kingdom by a British subject, whatever may be his domicile at the time of making the same or at his death, shall as regards personalty be held to be well executed for the purpose of being admitted to probate, if the same is made according to the forms required either by the law of the place where the same was made or by the law of the place where the testator was domiciled when the same was made, or by the law then in force in that part of His Majesty's dominions where the testator had his domicile of origin. See *Re Grassi*, [1905] 1 Ch. 584; 74 L. J. Ch. 341. Such a will is valid, if valid according to the law of the country or place where it is made, although no specific form or forms are prescribed for the making of wills by the law of such country or place, *Stokes* v. *Stokes*, 67 L. J. P. 55. Every will made within the United Kingdom (sect. 2) by a British subject, whatever his domicile at the time of making the same or at his death, shall as regards personalty be held to be well executed and admitted to probate or confirmation, if the same is executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. No will shall be held to be revoked (sect. 3) or to have become invalid, nor the construction thereof be altered, by reason of any subsequent change of domicile of the testator. Nothing in the Act contained shall (sect. 4) invalidate any will, as regards personalty, which would have been valid if the Act had not passed, except as such will may be revoked or altered by any subsequent will made valid by the Act. The Act extends (sect. 5) only to wills made by persons dying after August 6, 1861.

When a British subject dies abroad after the passing of this Act, leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to file affidavits showing that he had not acquired a foreign domicile, *In b. Rippon*, 3 Sw. & Tr. 177; 32 L. J. P. 141.

In determining what papers are testamentary under this Act, the Court has regard to the law of one country only, and will not mix up the legal precepts of different countries, *Pechell* v. *Hilderley*, L. R. 1 P. & D. 673; 38 L. J. P. 66.

The Act applies to the wills of naturalized British subjects, *In b. Gally*, 1 P. D. 438; 45 L. J. P. 107; *In b. Lacroix*, 2 P. D. 94; but not to the wills of foreigners executed abroad, *In b. Von Buseck*, 6 P. D. 211; 51 L. J. P. 9; *Bloxam* v. *Favre*,

9 P. D. 130; 53 L. J. P. 26. It has been held that sect. 3 of the Act is not limited in its operation to the wills of British subjects, *In b. Groos*, [1904] P. 269; 73 L. J. P. 83.

Operation of the Act 24 & 25 Vict. c. 114.

The operation of this Act may be illustrated by the following examples :—

1. A testator, a British subject, who, at the date of his will, is domiciled in England, makes his will in France; so far as regards personalty (see *Re Lyne's Settlement Trusts*, [1919] 1 Ch. 80), that will is valid if made according to the forms required by the law either of England or of France.

2. A testator, a British subject, who, at the date of his will, is domiciled in France, makes his will in England; so far as regards personalty (and so far as probate in England is concerned), that will is valid if made according to the forms required by the law of England (by sect. 2) or of France (by sect. 4).

3. A testator, a British subject, whose original domicile was English, who, at the date of the will, is domiciled in France, makes his will in Germany; so far as regards personalty (and so far as probate in England is concerned), that will is valid if made according to the forms required by the law of England, or of France, or of Germany.

4. And in none of the above instances will the will be invalidated by a change of domicile subsequent to the date of the will.

5. This Act leaves untouched the law of devolution of personalty in cases of intestacy as depending upon the law of domicile.

Many of the cases on domicile have arisen in regard to the wills of Scotchmen domiciled, or supposed to be domiciled, in England; and of Englishmen domiciled, or supposed to be domiciled, in Scotland. The 2nd section of the Act operates beneficially in admitting such wills to probate (in England or Ireland) or confirmation (in Scotland) if executed with the forms required by the law of that part of the United Kingdom where the execution takes place, quite irrespective of whether the testator's domicile be English or Scotch. A domiciled Scotchman made a will, afterwards married in Scotland, and subsequently acquired an English domicile which he retained until his death; it was held, under sect. 3, that as the will was valid so long as he remained in Scotland, it was not revoked by the subsequent change of domicile, *In b. Reid*, L. R. 1 P. & D. 74; 35 L. J. P. 43. And compare *Re Martin*, [1900] P. 211; 69 L. J. P. 75.

The Wills Act extends to Ireland but not to Scotland. As to Scotland and as to the Colonial law of wills, see Wills Act, *ante*, sect. 35, and the note thereto.

III.

ON INTESTACY.

The law of intestacy applies to all property which, capable of being disposed of by will, is not thereby effectively disposed of. It is often advisable for a testator to bear in mind how his property would devolve in the absence of a testamentary disposition of it, and in administering a testator's estate questions frequently arise as to the devolution of property of which, by lapse or otherwise, his will has failed to effect a disposition. Thus in contemplation the law of intestacy will often come before the rules of construction, but in its application after them.

Real property follows the *lex loci*. Personal property, in which leaseholds are included, follows the law of domicile. All property, real and personal, devolves upon the deceased person's personal representative, who has to pay the debts, funeral and testamentary expenses, and the death duties on the personal property.

The law of intestacy has been altered in regard to persons dying after 1925 by the Administration of Estates Act, 1925 (15 Geo. 5, c. 23). But the old law of intestacy, as regards real estate (not including chattels real), applies in the case of a lunatic or defective living and of full age on January 1, 1926 (Administration of Estates Act, 1925, s. 51), and for some years to come the old law, applicable to persons dying intestate before 1926, will be required.

On Intestacies before 1926.

If the intestate was a woman and died leaving a husband, the husband took her personal property *jure mariti*. If the intestate was a man and died totally intestate leaving a widow and no issue, the widow was entitled to £500 rateably out of the real and personal estate (Intestates Estates Act, 1890). Subject to the foregoing conditions the surplus of the personal property was distributable amongst the statutory next-of-kin, and the real property, subject to the possible estate of a husband by curtesy or of a widow in dower, descended to the heir-at-law of the last "purchaser," the heir, that is, in most cases of the person who last acquired the land otherwise than by descent (Inheritance Act, 1833, ss. 1 and 2). See Sanger on Wills and Intestacies, ch. 17, as to descent of realty.

By the Statute of Distributions, 1670 (22 & 23 Car. 2, c. 10), it was provided as follows (*a*) :—

"That all ordinaries and every other person who by this Act

(*a*) The numbering of the sections is taken from the Statutes at Large. In the Revised Statutes, sects. 5 and 6 are numbered 3, sect. 7 is numbered 4, and sect. 8 is numbered 5.

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is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following : that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made : and in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated : but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise from the intestate." (Sect. 5.)

"In case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree and those who legally represent them." (Sect. 6.)

"That there be no representations admitted among collaterals after brothers' and sisters' children : and in case there be no wife, then all the said estate to be distributed equally to and amongst the children : and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever." (Sect. 7.)

And by the statute 1 Jac. 2, c. 17, s. 7, it was provided that—

"If after the death of a father, any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her."

It must be borne in mind that in distributing the estate of a father who died wholly intestate, any child of his who had received from him any advance or, not being heir-at-law, an estate by settlement had to bring the same into hotchpot, *Re Natt*, 37 Ch. D. 517; 57 L. J. Ch. 797.

The following table as to personalty may be useful for ready reference in the case of intestacy before 1926. Authorities, sometimes other than the statutes, are given. And it is in each

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case assumed that the intestate was domiciled in England (see Appendix II.) and left no surviving husband and no nearer relative than such as are mentioned.

If the Intestate died before 1926 leaving	*The personalty passed*
1. Wife, sons and daughters, but no grandchildren.	$\frac{1}{3}$ to wife; $\frac{2}{3}$ to children, Stat. of Distrib.
2. Wife, sons, daughters, and children of a deceased son or daughter.	$\frac{1}{3}$ to wife; $\frac{2}{3}$ to the others, the children of a deceased son or daughter taking between them the share which their parent would, if living, have taken, *ibid.*
3. Wife, brothers and sisters	$\frac{1}{2}$ to wife; $\frac{1}{2}$ to brothers and sisters equally, *ibid.*
4. Wife only; no relatives	$\frac{1}{2}$ to wife; $\frac{1}{2}$ as under 26, *infra*, *Cave* v. *Roberts*, *ibid.*
5. Wife, father, mother, brothers and sisters.	$\frac{1}{2}$ to wife; $\frac{1}{2}$ to father, *Keylway* v. *Keylway*, 2 P. W. 344.
6. Wife, mother, brothers, sisters, nephews and nieces.	$\frac{1}{2}$ to wife; $\frac{1}{2}$ to others equally, the nephews and nieces taking *per stirpes*, 1 Jac. 2, c. 17, s. 7; *Keylway* v. *Keylway*, 2 P. W. 344; *Stanley* v. *Stanley*, 1 Atk. 455.
7. Wife, mother, nephews and nieces.	$\frac{1}{2}$ to wife; $\frac{1}{2}$ equally between the mother, and the nephews and nieces *per stirpes*, *Stanley* v. *Stanley*, 1 Atk. 455.
When the Intestate left no Wife.	
8. Father, mother, brothers and sisters.	To father, *Ratcliffe's Case*, 3 Rep. 40 a; *Blackborough* v. *Davis*, 1 P. W. 41.
9. Mother, brothers and sisters ...	To all equally, 1 Jac. 2, c. 17, s. 7; *Jessopp* v. *Watson*, 1 M. & K. 665; 2 L. J. (o.s.) Ch. 197.
10. Mother and posthumous brother.	To both equally, *Burnet* v. *Mann*, 1 Ves. Sen. 156.
11. Mother, brothers, sisters, nephews and nieces.	To all equally, the nephews and nieces taking *per stirpes*, 1 Jac. 2, c 17, s. 7.
12. Mother, nephews and nieces ...	Equally between the mother and the nephews and nieces *per stirpes*, *ibid.*

13. Mother only; no father, issue, brother, sister, nephew or niece.	To mother, *Ratcliffe's Case*, 3 Rep. 40a; *Jessopp* v. *Watson*, 1 M. & K. 676; 2 L. J. (o.s.) Ch. 197.
14. Father's father, and mother's father.	To both equally, *Moor* v. *Barham*, 1 P. W. 53.
15. Grandfather or grandmother, and uncle or aunt.	To grandfather or grandmother, *Lloyd* v. *Tench*, 2 Ves. Sen. 215.
16. Child or children only	All to child, *Palmer* v. *Garrard*, Pr. Ch. 21; or if more than one, to children equally, Stat. of Distrib.
17. Sons, daughters, and children of deceased son or daughter.	To sons and daughters equally, and to children of deceased son or daughter the share which their parent would, if living, have taken, Stat. of Distrib.
18. Brothers or sisters of whole blood and brothers or sisters of half blood.	To all equally, *Jessopp* v. *Watson*, 1 M. & K. 665; 2 L. J. (o.s.) Ch. 197.
19. Brothers, sisters, nephews and nieces.	Equally to brothers and sisters *per capita* and nephews and nieces *per stirpes*, *Lloyd* v. *Tench*, 2 Ves. Sen. 215.
20. Brother and grandfather	To brother, *Evelyn* v. *Evelyn*, 3 Atk. 762.
21. Brother and uncle or aunt ...	To brother, *Lloyd* v. *Tench*, 2 Ves. Sen. 215.
22. Uncles, aunts, nephews and nieces.	To all equally, *Durant* v. *Prestwood*, 1 Atk. 454.
23. Uncle and cousin	To uncle, *Bowers* v. *Littlewood*, 1 P. W. 594.
24. Nephews and nieces	To all equally *per capita*, *ibid.*
25. Nephew and grandnephew ...	To nephew, *Pett's Case*, 1 P. W. 25.
26. No relative	To the Crown, *Cave* v. *Roberts*, 8 Sim. 214; 6 L. J. Ch. 4. But if the intestate died domiciled in Cornwall, to the Duke of Cornwall, *Solicitor of the Duchy of Cornwall* v. *Canning*, 5 P. D. 114.

In all cases there was no distinction between the half and the whole blood so long as there is a common ancestor, *Jessopp* v.

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Old law.

Watson, 1 M. & K. 665; 2 L. J. (o.s.) Ch. 197; and a person *en ventre sa mère* at the death of the intestate was to be considered as *in esse*, *Wallis* v. *Hodson*, 2 Atk. 115; *Burnet* v. *Mann*, 1 Ves. Sen. 156.

In illustration of the first of these remarks it may be observed that if a man married twice and died intestate leaving a widow and two daughters, one by each wife, the two-third shares of children [see 2 in the above Table] were shared equally by the daughters, and if one of them died intestate after the widow's death the other of them stood in the same position to the one who had died as a sister of the whole blood. But if after the man's death his widow died intestate, the man's daughter by a former marriage took nothing on such intestacy, as she was not of kin to the intestate.

Except where notice had been given under sect. 29 of the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), distribution might not be made until the expiration of one year after the intestate's death (22 & 23 Car. 2, c. 10, s. 8); but the distributive shares vested at the death, *Davers* v. *Dewes*, 3 P. W. 40, at 50, note [D]; *Browne* v. *Shore*, 1 Show. 25. The right to postpone distribution for a year is now conferred by sect. 44 of the Administration of Estates Act, 1925.

ON INTESTACIES AFTER 1925.

New law.

When, after 1925, a person dies intestate as to any real or personal estate, his personal representatives hold such estate upon trust for sale and conversion, but the "personal chattels" (*post*, p. 428), unless required for purposes of administration owing to want of other assets, are not to be sold except for special reason (Administration of Estates Act, 1925, s. 33). Subject to payment of funeral, testamentary and administrative expenses and debts out of the net money arising from sale and conversion, the residue of such money, and investments representing it, is to be distributed in accordance with Part IV. of the Act, which is as follows :—

"PART IV.

"DISTRIBUTION OF RESIDUARY ESTATE.

Abolition of descent to heir, curtesy, dower and escheat.

"45.—(1) With regard to the real estate and personal inheritance of every person dying after the commencement of this Act, there shall be abolished—

"(a) All existing modes rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate, or of a personal inheritance, whether operating by the general law or by the custom of gavelkind or borough english or by any other custom of any county, locality, or manor, or otherwise howsoever; and

"(b) Tenancy by the curtesy and every other estate and interest of a husband in real estate as to which his wife dies intestate, whether arising under the general law or by custom or otherwise; and

"(c) Dower and freebench and every other estate and interest of a wife in real estate as to which her

husband dies intestate, whether arising under the general law or by custom or otherwise: Provided that where a right (if any) to freebench or other like right has attached before the commencement of this Act which cannot be barred by a testamentary or other disposition made by the husband, such right shall, unless released, remain in force as an equitable interest; and

" (d) Escheat to the Crown or the Duchy of Lancaster or the Duke of Cornwall or to a mesne lord for want of heirs.

" (2) Nothing in this section affects the descent or devolution of an entailed interest.

Succession to real and personal estate on intestacy.

" 46.—(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely :—

" (i) If the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of one thousand pounds, free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of five pounds per cent. per annum until paid or appropriated, and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held—

" (a) If the intestate leaves no issue, upon trust for the surviving husband or wife during his or her life;

" (b) If the intestate leaves issue, upon trust, as to one half, for the surviving husband or wife during his or her life, and, subject to such life interest, on the statutory trusts for the issue of the intestate; and, as to the other half, on the statutory trusts for the issue of the intestate, but if those trusts fail or determine in the lifetime of a surviving husband or wife of the intestate, then upon trust for the surviving husband or wife during the residue of his or her life :

" (ii) If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate;

" (iii) If the intestate leaves no issue but both parents, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the father and mother in equal shares absolutely;

" (iv) If the intestate leaves no issue but one parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be

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held in trust for the surviving father or mother absolutely;

" (v) If the intestate leaves no issue or parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely :—

" First, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

" Secondly, on the statutory trusts for the brothers and sisters of the half blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

" Thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

" Fourthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

" Fifthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

" Sixthly, for the surviving husband or wife of the intestate absolutely;

" (vi) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat.

The Crown or the said Duchy or the said Duke may (without prejudice to the powers reserved by section nine of the Civil List Act, 1910, or any other powers), out of the whole or any part of the property devolving on them respectively, provide, in accordance with the existing practice, for dependents, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

" (2) A husband and wife shall for all purposes of distribution or division under the foregoing provisions of this section be treated as two persons.

Statutory trusts in favour of issue and other

" 47.—(1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely :—

classes of relatives of intestate.

" (i) In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of twenty-one years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking;

" (ii) The statutory power of advancement, and the statutory provisions which relate to maintenance and accumulation of surplus income, shall apply, but when an infant marries such infant shall be entitled to give valid receipts for the income of the infant's share or interest;

" (iii) Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives;

" (iv) The personal representatives may permit any infant contingently interested to have the use and enjoyment of any personal chattels in such manner and subject to such conditions (if any) as the personal representatives may consider reasonable, and without being liable to account for any consequential loss.

" (2) If the trusts in favour of the issue of the intestate fail by reason of no child or other issue attaining an absolutely vested interest—

" (a) the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same, shall go, devolve and be held under the provisions of this Part of this Act as if the intestate had died without leaving issue living at the death of the intestate;

" (b) references in this Part of this Act to the intestate

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'leaving no issue' shall be construed as 'leaving no issue who attain an absolutely vested interest';

"(c) references in this Part of this Act to the intestate 'leaving issue' or 'leaving a child or other issue' shall be construed as 'leaving issue who attain an absolutely vested interest.'

"(3) Where under this Part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.

Powers of personal representative in respect of interests of surviving spouse.

"48.—(1) Where a surviving husband or wife is entitled to a life interest in the residuary estate or any part thereof the personal representative may, either with the consent of any such tenant for life (not being also the sole personal representative) or, where the tenant for life is the sole personal representative, with the leave of the court, purchase or redeem such life interest (while it is in possession) by paying the capital value thereof (reckoned according to tables selected by the personal representative) to the tenant for life or the persons deriving title under him or her and the costs of the transaction, and thereupon the residuary estate of the intestate may be dealt with or distributed free from such life interest.

"(2) The personal representatives may raise—

"(a) the net sum of one thousand pounds or any part thereof and the interest thereon payable to the surviving husband or wife of the intestate on the security of the whole or any part of the residuary estate of the intestate (other than the personal chattels), so far as that estate may be sufficient for the purpose or the said sum and interest may not have been satisfied by an appropriation under the statutory power available in that behalf; and

"(b) in like manner the capital sum, if any, required for the purchase or redemption of the life interest of the surviving husband or wife of the intestate, or any part thereof not satisfied by the application for that purpose of any part of the residuary estate of the intestate;

and in either case the amount, if any, properly required for the payment of the costs of the transaction.

Application to cases of partial intestacy.

"49. Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications:—

"(a) The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the

deceased, but not to beneficial interests so acquired by any other persons : Intestacy.

" (b) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part of this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially.

" 50.—(1) References to any Statutes of Distribution in an instrument inter vivos made or in a will coming into operation after the commencement of this Act, shall be construed as references to this Part of this Act; and references in such an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part of this Act. Construction of documents.

" (2) Trusts declared in an instrument inter vivos made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act.

" 51.—(1) Nothing in this Part of this Act affects the right of any person to take beneficially, by purchase, as heir either general or special. Savings.

" (2) The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case.

" For the purposes of this subsection, a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged.

" (3) Where an infant dies after the commencement of this Act without having been married, and independently of this subsection he would, at his death, have been equitably entitled under a settlement (including a will) to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, and the settlement shall be construed accordingly.

" (4) This Part of this Act does not affect the devolution of an entailed interest as an equitable interest.

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Interpretation of Part IV.

"52. In this Part of this Act 'real and personal estate' means every beneficial interest (including rights of entry and reverter) of the intestate in real and personal estate which (otherwise than in right of a power of appointment or of the testamentary power conferred by statute to dispose of entailed interests) he could, if of full age and capacity, have disposed of by his will."

The meaning of "personal chattels" is defined in sect. 55 (1) (x) of the Act as follows :—

Sect. 55.—(1) "(x) 'Personal chattels' mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money."

DISTRIBUTION AFTER 1925.

Personal chattels.

After 1925, therefore, the "personal chattels" will go absolutely to the spouse (sect. 46 (1)) unless required to be sold under sect. 33 (1), and the residuary realty (subject to sect. 51 (2)) and chattels real of an intestate will be sold, and the personalty called in, sold and converted into money, under sect. 33. After paying funeral, testamentary, and administration expenses, debts and other liabilities, and setting aside a fund to provide for any pecuniary legacies (sect. 33 (2)), the "personal chattels," if not required to be sold, will be given to the spouse, or dealt with under sect. 47 (1) (iv), and the residue will stand charged in favour of the spouse, with the

£1,000 net.

payment of a net sum of £1,000, free of death duties and costs, with interest from the death at 5 per cent. until paid or appropriated (sect. 46 (1) (i)). Subject thereto the residuary estate will then be distributable in the following order :—

If the Intestate die after 1925 leaving	*The property passes*
1. Spouse but no other of the relatives specified below who attain a vested interest.	To spouse absolutely.
2. Spouse and issue	½ to spouse for life (redeemable under sect. 48). Subject thereto to issue who attain 21 or marry, in equal shares *per stirpes*.
3. Spouse and any other of the persons specified below except issue.	To spouse for life (redeemable under sect. 48). Subject thereto to the specified persons (other than 4 but including 11) in due order as under, but if no spouse—

4. Issue	To such issue as attain 21 or marry, in equal shares *per stirpes*, but if none—
5. Parent	To parent. If more than one parent, to them in equal shares, but if none—
6. Brothers and sisters of the whole blood or their issue.	To such brothers and sisters and issue of a deceased brother as attain 21 or marry, in equal shares *per stirpes*, but if none—
7. Brothers and sisters of the half blood or their issue.	To such half-brothers and half-sisters and issue of a deceased half-brother or half-sister as attain 21 or marry in equal shares *per stirpes*, but if none—
8 Grandparent	To grandparent. If more than one grandparent, to them in equal shares, but if none—
9. Uncles and aunts of the whole blood or their issue.	To such uncles and aunts and issue of a deceased uncle or aunt as attain 21 or marry, in equal shares *per stirpes*, but if none—
10. Uncles and aunts of the half blood or their issue.	To such uncles and aunts of the half-blood and issue of a deceased uncle or aunt of the half-blood as attain 21 or marry in equal shares *per stirpes*, but if none—
11. No such person above mentioned as becomes absolutely entitled.	To the Crown, Duchy of Lancaster, or Duke of Cornwall, as the case may be.

IV.

DEPOSITORY FOR WILLS OF LIVING PERSONS.

Amended Regulations.

In pursuance of the provisions of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77, s. 91), the Principal Probate Registry of the High Court of Justice, Somerset House, Strand, London, is the depository now provided for the wills of living persons, and testators are at liberty to deposit their wills or codicils therein, under the following regulations :—

1. The will or codicil to be deposited must be brought into the Record Keeper's Department, and acknowledged as that of the testator before one of the Registrars, either by the testator himself, or by some person specially authorised by him to deposit the same on his behalf.

2. The will or codicil so deposited will not *under any circumstances* be delivered out of the Registry, nor revoked by destruction.

3. Deposit in Person.—In case the testator himself deposits his will or codicil, he will be required to sign his name, or acknowledge his signature, in the presence of the Registrar, to an endorsement on the envelope in which the will or codicil is enclosed, to the following effect :—

" This sealed packet contains the last will and testament, or codicil to the last will and testament, or last will and testament and codicil thereto, bearing date respectively (here state the dates of all the papers enclosed) of A. B., of, &c., whereof C. D., of, &c., and E. F., of, &c., are appointed executors, and the same are brought into the Principal Probate Registry of the High Court of Justice by me for safe custody, there to remain deposited until after my decease." *The residences of the testator and of the executors should be set forth in this endorsement, and also the date of the testator's signature thereto.*

4. Deposit by Agent.—In case the testator authorises some other person to deposit his will or codicil for him, he will be required to subscribe his name, in presence of a witness, to an endorsement on the envelope in which the will or codicil is enclosed, to the following effect :—

" This sealed packet contains the last will and testament, or codicil to the last will and testament, or last will and testament and codicil thereto, of me, A. B., of, &c., whereof C. D., of, &c., and E. F., of, &c., are appointed executors, and I authorise G. H. to deposit the same for safe custody in the Principal Probate Registry of the High Court of Justice, there to remain deposited until after my decease." (Signed) A. B. Witness, K. L. *The residences of the testator and of the executors should*

be set forth in this endorsement, and also the date of the testator's signature thereto.

The packet containing the will or codicil must be accompanied by an affidavit of the witness, to the effect that the signature of the testator to the above endorsement, deposed by the witness, is in the proper handwriting of such testator, and was by him signed in the witness's presence on the day mentioned in the endorsement, and that the signature K. L. is in the handwriting of the deponent. An affidavit will also be required from the person authorised to deposit the packet, to the effect that the packet which is produced for the purpose of being deposited for safe custody in the Principal Probate Registry of the High Court of Justice, and on the back of which the deponent has signed his name, is at the time of making the affidavit precisely in the same state, plight, and condition, as when received by the deponent from the hands of A. B. [the testator] on a day to be mentioned as that on which he received it.

The last-mentioned affidavit is to be sworn before the Registrar to whom the packet containing the will or codicil is delivered.

5. In case the testator is a lunatic, his will or codicil may be deposited for or on behalf of the Masters in Lunacy.

The Master in Lunacy, or the person depositing the will or codicil on his behalf, will be required to sign his name, or acknowledge his signature in the presence of the Registrar, to an endorsement on the envelope in which the will or codicil is enclosed, to the following effect :—

"This sealed packet contains the last will and testament, or codicil to the last will and testament, or last will and testament and codicil thereto, bearing date respectively (here state the dates of all the papers enclosed) of A. B., now a lunatic, of, &c., whereof C. B., of, &c., and E. F., of, &c., are appointed executors, and the same are brought into the Principal Probate Registry of the High Court of Justice by the Masters in Lunacy for safe custody, there to remain deposited until after the decease of the testator." *The residences of the testator and of the executors should be set forth in this endorsement, and also the date of the testator's signature thereto.*

6. A minute setting forth the production of the packet containing the will or codicil, and the affidavits (if any), and when and by whom the same were produced, and the declaration of the testator, or his agent, that he deposited the same in the Registry for safe custody, and also acknowledging the receipt of the packet, will be drawn up in duplicate, and will be signed by the Registrar. One copy of this minute will be delivered to the testator, or his agent, and the other will be retained in the Registry.

7. The following fees will be payable in judicature fee stamps :—

	£	s.	d.
For depositing the will and receipt for same ...	0	10	0
For drawing and entering minute of the Registrar	0	2	6
For filing each affidavit	0	2	0

Depository for Wills.

8. Deposit through a District Registrar.—Testators are at liberty to transmit their wills and codicils to the Principal Probate Registry, to be deposited there for safe custody, through the Registrar of a District Probate Registry, who will send the same by the general post in a registered letter.

The affidavit of the person authorised by the testator to deposit his will or codicil will, in that case, be sworn before the District Registrar, to whom the packet containing it is delivered.

On production to the District Registrar of the sealed packet containing the will or codicils to be deposited, and the affidavits (if any), he will draw up a certificate in duplicate under his hand, setting forth when and by whom the same were produced to, and left with him. He will deliver one of these certificates to the testator or his agent and retain the other in his District Registry, and he will transmit an office copy of the certificate, with the sealed packet and affidavits, and a form of receipt, to the Principal Registry. The receipt will be returned to him under the hand of one of the Registrars of the Principal Registry.

The following fees will be payable to the District Registrar in addition to the fees before mentioned :—

	£	s.	d.
For his certificate	0	2	6
For filing same	0	2	6
For office copy of the same to transmit to the Principal Registry	0	2	6
For receipt	0	1	0

All fees are to be retained in the District Registry.

9. Opening a Deposited Will.—On the death of a testator who has deposited a will or codicil during his lifetime, the certificate of death and, when possible, the Registrar's minute or certificate on the deposit must be produced. The executors will be required to attend and acknowledge before one of the Registrars that they are the executors named in the will. They will be sworn to the will (which is not delivered up) before a Commissioner in the Registry.

The following fees will be payable :—

	s.	d.
For filing minute on opening will	2	6
For search, if Registrar's minute be not produced	1	0

10. Forms and Envelopes.—All forms and envelopes required for deposit of wills are to be had on application at the Record Keeper's Department of the Principal Probate Registry.

Dated the 15th day of May, 1914.

(Signed) S. T. EVANS,

President.

Note.—Wills under which the Public Trustee is appointed may be deposited with him without charge. An official receipt is issued at the Office.

See sect. 172 of the Supreme Court of Judicature (Consolidation) Act, 1925.

V.

STATUTORY RULES AND ORDERS, 1925, No. 780—L. 15.

LAW OF PROPERTY.

WILLS.

THE STATUTORY WILL FORMS, 1925. DATED AUGUST 7, 1925.

I, George Viscount Cave, Lord High Chancellor of Great Britain, in exercise of the powers conferred upon me by section 179 of the Law of Property Act, 1925 (*a*), and every other power enabling me in that behalf, hereby prescribe and publish the forms hereinafter contained as forms to which a testator may refer in his will and give the following directions as to the manner of reference.

Dated the 7th day of August, 1925.

CAVE, C.

STATUTORY WILL FORMS.

Short title.

1. The forms hereinafter contained may be cited as the Statutory Will Forms, 1925, and are divided into two groups called Part I. and Part II. respectively.

Manner of application.

2. The Forms in Part I. may be incorporated in a will by a general reference to that Part, and the Forms in Part I. and Part II. or any of them may be incorporated in a will in manner indicated in the Schedule hereto or in any other manner indicating an intention to incorporate them, and in the case of Forms in Part II. also indicating what property or disposition is to be affected thereby.

Interpretation.

3. (1) In any form when incorporated in a will—

(i) The provisions thereof shall have effect subject to the express provisions of the will;

(ii) "Disposition" means a devise, bequest, and a testamentary appointment, whether in exercise of a general or special power and includes a disposition under the statutory power to dispose of entailed interests by will; "dispose of" has a corresponding meaning; and references to a testator's property include property which he disposes of in exercise of a power;

(*a*) 15 Geo. 5, c. 20.

Note.—These forms are intended to apply only in the case of wills taking effect on or after the 1st day of January, 1926.

Statutory Rules and Orders.

(iii) "The trustees" mean the trustees appointed by the testator either generally or for a specific purpose, as the case may require, and the persons who by appointment by the court or otherwise become the trustees, and include his personal representatives, when acting as his trustees:

(iv) "Authorised investments" mean investments authorised by the will creating the trust, for the investment of any money subject to the trusts of the will, or by law.

(v) Other words and expressions have the same meanings as in the Law of Property Act, 1925.

FORMS.

Part I.

Forms which may be applied either generally or by specific reference.

Form 1.

Confirmation of settlements.

I confirm every settlement of property made by me which is subsisting at my death, and subject to any express provision to the contrary in my will, the provisions made by my will for the benefit of persons beneficially interested under any such settlement, shall be in addition to, and not in satisfaction of, those made, or covenanted to be made by me in such settlement.

Form 2.

Meaning of "personal chattels."

(1) "Personal chattels" shall mean "carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, including wearing apparel), also musical and scientific instruments and apparatus, wines, liquors, and consumable stores, but shall not include any chattels used at my death for business purposes, nor money or securities for money."

(2) But a general disposition of personal chattels shall take effect subject to any specific disposition.

Form 3.

Inventories and provisions respecting chattels.

(1) An inventory of chattels given by my will, otherwise than by way of absolute gift, shall be made in duplicate, one part shall be retained by the trustees and the other part shall be delivered to the person of full age for the time being entitled to the use or possession of the chattels, in this clause called the "usufructuary."

(2) A receipt shall be signed by the usufructuary, at the foot of the inventory retained by the trustees.

(3) The inventory delivered to the usufructuary shall, if he so requires, be signed at the foot thereof by the trustees.

(4) On any change of the right to the use or possession of the chattels, a new receipt shall be signed by the usufructuary at the foot of the inventory retained by the trustees.

(5) Where, by reason of the exercise of any power to sell, exchange, purchase, alter the fashion of, or otherwise deal with the chattels, or of any destruction or loss of any chattel, the inventories become inaccurate, the inventories shall be altered and re-signed, or new inventories shall, if convenient, be made and signed.

(6) The trustees may, at their discretion, exclude from an inventory, any chattels which, by reason of their trifling value or wearing out nature, they may consider ought to be so excluded.

(7) Where the chattels have been delivered to the usufructuary and a receipt is given therefor, the trustees, so long as the usufructuary remains entitled to the use of the chattels, shall not be liable in any way—

(a) for any unauthorised disposition thereof or dealing therewith,

(b) to see to the insurance (so far as the same are capable of being insured) repair, or safe custody of the chattels,

unless and until required, in writing, to insure the chattels or to take any proceedings in reference thereto, by some person beneficially interested in the chattels or by his guardian, committee or receiver, and unless also due provision be made, to the satisfaction of the trustees, for the payment of the costs of insurance or of any proceedings required to be taken.

(8) Where there is no person of full age and capacity entitled to the use of the chattels, the trustees may, during the period of disability, make such arrangements for the safe custody, repair, insurance and use of the chattels as, having regard to the circumstances of the case, they may in their absolute discretion, think expedient.

Form 4.

Legacies to charities.

The receipt of the treasurer or other proper officer of a charitable benevolent or philanthropic institution, society or body of persons (corporate or incorporate), to which a legacy is given by my will shall be a complete discharge of my personal representatives.

Form 5.

Directions respecting annuities.

The following provisions shall have effect in regard to any annuities or annuity given by my will—

(1) The trustees may, and (if so requested by or on behalf of any person beneficially interested in the property affected), shall, as soon as may be after any annuity commences to accrue, set apart in their names or under their control authorised investments to provide a fund the income whereof will be sufficient, in the opinion of the trustees, to produce an annual sum equal to the amount of the annuities for the time being payable under my will.

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(2) The income or, if necessary, the capital of the fund so appropriated, shall be applied in payment of every subsisting annuity.

(3) Until a fund shall be so appropriated, my residuary estate shall stand charged with the payment of every subsisting annuity, but, after appropriation, the said estate shall be thereby discharged therefrom.

(4) The appropriated fund, or, where more than one annuity is bequeathed, such parts thereof as, in the opinion of the trustees, may not be required to answer any subsisting annuity, shall, on the cesser of an annuity, fall into my residuary personal estate.

(5) Accordingly, as each annuity ceases, the trustees may treat as part of my residuary personal estate, the whole or a corresponding part of the appropriated fund, as the case may require, retaining only such part thereof (if any) as may, from time to time, in their opinion, be sufficient to produce, by the income thereof, an annual sum equal to the amount of any subsisting annuities.

(6) Any surplus income of the appropriated fund shall be applied in the same manner as the income of my residuary personal estate.

(7) The trustees may, at their discretion, vary any of the investments for the time being representing the appropriated fund for other authorised investments.

(8) In this clause "annuity" includes any periodical payment (not being a rentcharge) for life or other terminable interest.

Form 6.

Power of appropriation.

(1) The power of appropriation conferred by the Administration of Estates Act, 1925, shall be exercisable by the trustees, without any of the consents made requisite by that Act.

(2) So far as practicable, the trustees shall give one month's notice, at least, of an intended appropriation, to the persons whose consent would, but for this clause, be required under that Act; but a purchaser shall not be concerned to see or inquire whether any such notices have been given.

(3) In this clause "trustees" includes my personal representatives.

PART II.

FORMS WHICH CAN ONLY BE APPLIED BY SPECIFIC REFERENCE.

Form 7.

Trusts of a settled legacy.

Any legacy of money or investments to which this clause is applied shall be subject to the following provisions:—

(1) The trustees shall stand possessed of the legacy upon trust to invest the same in their names or under their control in any authorised investments, with

power, at the like discretion, to vary the investments thereof for others of a like nature.

(2) The trustees shall stand possessed of the legacy, and of the investments representing the same and all statutory accumulations, if any, of income thereof, hereinafter included in the description of such legacy upon trust to pay the income thereof to the legatee during the life of the legatee.

(3) After the death of the legatee, the capital and income of the legacy shall be held—

In trust for all or any one or more exclusively of the other or others, of the issue of the legatee, whether children or remoter descendants, at such time, and if more than one in such shares, with such provisions for maintenance, education, advancement, and otherwise, at the discretion of any person or persons, and with such gifts over, and generally in such manner, for the benefit of such issue, or some or one of them, as the legatee shall, by deed, revocable or irrevocable, or by will appoint; but so that, under any appointment a child shall not, otherwise than by way of advancement, take a vested interest, except upon attaining the age of twenty-one years or upon marriage.

And in default of and until and subject to any such appointment—

In trust for all or any the children or child of the legatee, who attain the age of twenty-one years, or marry under that age, and if more than one in equal shares.

(4) Any child of the legatee, who, or whose issue, takes any part of the legacy under any appointment by the legatee, shall not, in the absence of any direction by the legatee to the contrary, take any share in the unappointed part without bringing the share or shares appointed to him or his issue into hotchpot and accounting for the same accordingly.

(5) If the legatee shall not have any child who, under the trusts in default of appointment hereinbefore contained, attains a vested interest in the legacy, then, subject to the trusts and powers hereinbefore expressed in favour of the legatee and his issue, the legacy and the income thereof and all statutory accumulations, if any, of income shall fall into and form part of my residuary personal estate.

(6) The legatee may, notwithstanding any of the trusts hereinbefore expressed concerning his legacy, from time to time or at any time by deed, revocable or irrevocable, or by will, appoint to or for the benefit of any spouse who may survive the legatee, during the residue of the life of such spouse or for any less period (and subject or not to any conditions, and with such gifts over, and discretionary or other

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trusts for the benefit of the spouse and issue of the legatee, as the legatee may think fit), all or any part of the annual income of the legacy of the legatee, or of so much thereof as shall not, before the death of the legatee, have been paid or applied under any power affecting the same.

And, upon any such appointment, the trusts and powers limited to take effect after the death of the legatee, shall take effect subject to the interest limited by any such appointment:

Provided that the power last aforesaid, to appoint by deed, shall not be exercisable by a woman while under coverture.

Form 8.

Administration trusts.

Any property disposed of by my will (otherwise than in exercise of a special power) to which this clause is applied shall be subject to the following provisions:—

(1) The property shall be held—
  (a) as to the real property, if any, including chattels real, upon trust to sell the same, and
  (b) as to the personal property, if any, upon trust to call in, sell, and convert into money such part thereof as may not consist of money.

(2) The trustees shall have power to postpone such sale and conversion for such a period as they, without being liable to account, may think proper.

(3) A reversionary interest shall not be sold, until it falls into possession, unless the trustees see special reason for sale.

(4) The trustees shall out of the net money to arise from the sale and conversion of the property (after payment of costs, and out of any ready money of mine, included in the disposition, pay or provide for
  (a) my funeral and testamentary expenses;
  (b) my debts, except charges on other property of mine so far as those charges are discharged out of the property primarily charged therewith under the Administration of Estates Act, 1925;
  (c) the duties, payable out of capital on my death, and not charged on or primarily payable out of other property;
  (d) any other liabilities properly payable out of the property, or the proceeds of sale thereof;
  (e) the legacies (including money directed to be paid by my will), and annuities bequeathed by me, but so that all legacies and annuities, and the duty on all legacies and annuities bequeathed free of duty, shall be paid primarily out of personal property, if any, included in the disposition.

(5) The trustees may invest, in their names or under their control, the residue of the said money, or so much thereof as may not have been distributed, in any authorised investments, with power, at their discretion, to vary such investments for others of a like nature.

(6) The income (including net rents and profits of real property and chattels real, after payment of rates, taxes, rent, costs of insurance and of repairs and other outgoings properly attributable to income) of so much of the property as is not required for the administration purposes aforesaid, shall, however the property is invested, as from my death, be treated and applied as income; and for that purpose any necessary apportionment may be made between capital and income.

(7) Provided that—

(a) statutory accumulations of income made during a minority, or pending a contingency, or accumulations made under an express trust for accumulation, may be added to capital;

(b) income may be applied in effecting and maintaining a leasehold sinking fund policy, or may be set aside and invested for providing a fund to answer any liabilities which in the opinion of the trustees ought to be borne by income;

(c) the trustees may in their discretion adjust, in such manner as they shall think fit, having regard to the circumstances of the case, the incidence, as between capital and income, of the payments made in due course of administration.

Form 9.

Trusts for spouse for life with power to appoint to issue and gift over to them.

Any property disposed of by my will (otherwise than in exercise of a special power) to which this clause is applied shall be subject to the following provisions :—

(1) The property (including the investments for the time being representing the same) shall be held upon trust to pay the income thereof to my spouse for life.

(2) After the death of my spouse, the capital and income of the property shall be held—

(i) In trust for all or any one or more, exclusively of the other or others, of my issue, whether children or remoter descendants, at such time, and if more than one in such shares, with such provisions for maintenance, education, advancement and otherwise, at the discretion of any person or persons, and with such gifts over, and generally in such manner, for the benefit of such issue, or some or one

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of them, as my spouse shall, by deed, revocable or irrevocable, or by will, appoint; but so that, under any appointment, a child shall not, otherwise than by way of advancement, take a vested interest, except upon attaining the age of twenty-one years or upon marriage.

(ii) And in default of and until and subject to any such appointment in trust, in equal shares if more than one, for all or any my children or child who survive me and attain the age of twenty-one years or marry under that age, and for all or any of the issue living at my death who attain the age of twenty-one years or marry under that age of any child of mine who predeceases me, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share or shares which his or their parent would have taken if living at my death, and so that no issue shall take whose parent is living at my death and so capable of taking.

(3) Any person who, or whose issue, takes any part of the property, under any appointment by my spouse, shall not, in the absence of any direction by my spouse to the contrary, take any share in the unappointed part, without bringing the shares appointed to such person or his issue into hotchpot, and accounting for the same accordingly.

Form 10.

Trusts for spouse and issue, without a power of appointment.

Any property disposed of by my will (otherwise than in exercise of a special power) to which this clause is applied shall be subject to the following provisions :—

(1) The property (including the investments for the time being representing the same) shall be held upon trust to pay the income thereof to my spouse for life.

(2) After the death of my spouse the capital and income of the property shall be held in trust, in equal shares if more than one, for all or any my children or child, who survive me and attain the age of twenty-one years or marry under age, and for all or any of the issue living at my death, who attain the age of twenty-one years or marry under that age, of any child of mine who predeceases me, such issue to take through all degrees, according to their stocks, in equal shares, if more than one, the share or shares which his or their parent would have taken if living at my death; and so that no issue shall take whose parent is living at my death and so capable of taking.

SCHEDULE.

INCORPORATION OF ALL THE FORMS IN PART I.

All the forms contained in Part I. of the Statutory Will Forms, 1925, are incorporated in my will [subject to the following modifications, namely*].

* Here insert the modifications (if any).

INCORPORATION OF SPECIFIED FORMS FROM PART I.

The following forms contained in Part I. of the Statutory Will Forms, 1925, shall be incorporated in my will:—

[*Specify those of the following forms which it is desired to incorporate.*]

Form 1 (*Confirmation of Settlements*).
Form 2 (*Meaning of "personal chattels"*).
Form 3 (*Inventories and provisions respecting chattels*).
Form 4 (*Legacies to charities*).
Form 5 (*Directions respecting annuities*).
Form 6 (*Power of appropriation*).

[Subject to the following modifications, namely*].

* Here insert the modifications (if any).

INCORPORATION OF SPECIFIED FORMS FROM PART II.

FORM 7.

Trusts of a Settled Legacy.

Form 7 of the Statutory Will Forms, 1925, is incorporated in my will, and shall apply to the following legacies* [subject to the following modifications†].

* Here insert the legacies of money or investments to be settled.
† Here insert the modifications (if any)

FORM 8.

Administration Trusts.

Form 8 of the Statutory Will Forms, 1925, is incorporated in my will, and shall apply to* [subject to the following modifications†].

* Here insert description of property to be held upon administration trusts.
† Here insert the modifications (if any).

FORM 9.

Trusts for Spouse for life with power to appoint to issue and gift over to them.

Form 9 of the Statutory Will Forms, 1925, is incorporated in my will, and shall apply* [subject to the following modifications†].

* Here insert description of the property to be held on trusts for spouse for life with power to appoint to issue and gift over to them.
† Here insert the modifications (if any).

Statutory Rules and Orders.

Form 10.

Trusts for Spouse and issue without a power of appointment.

Form 10 of the Statutory Will Forms, 1925, is incorporated in my will, and shall apply to* [subject to the following modifications†].

* Here insert description of the property to be held on trusts for spouse and issue without power of appointment.

† Here insert the modifications (if any).

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[*References in Italics are to Notes; other references are to Forms, as to which see also* CONTENTS, *p.* xiii, *and* OUTLINE WILL, *p.* 116.]

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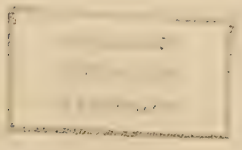
THE END.



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